TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900 1902.

No. 625. 1900. 79.

THE HARTFORD FIRE INSURANCE COMPANY, PETITIONER,

vs.

ALBERT A. WILSON AND JOHN B. LARNER, TRUSTEES.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FOR CERTIORARI FILED APRIL 8, 1901.
CERTIORARI AND RETURN FILED APRIL 23, 1901.

(18,110.)

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1 In the Court of Appeals of the District of Columbia.

ALBERT A. WILSON ET AL., Trustees, Appellants,
vs.
THE HARTFORD FIRE INSURANCE CO. } No. 959.

Supreme Court of the District of Columbia.

ALBERT A. WILSON ET AL.
vs.
THE HARTFORD FIRE INSURANCE COMPANY. } No. 38932. At Law.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration & Notice to Plead.

Filed Nov. 12, 1895.

In the Supreme Court of the District of Columbia.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Plaintiffs,
vs.
THE HARTFORD FIRE INSURANCE COMPANY of the City of Hartford, Connecticut, a Corporation Duly Incorporated under the Laws of the State of Connecticut, Defendants. } At Law. No. 38932.

1. The plaintiffs, as trustees, sue the defendant, a corporation duly incorporated under the laws of the State of Connecticut, but doing business and having an office in the District of Columbia, for that whereas heretofore, to wit, on the 17th day of April, A. D. 1895, the said defendant did execute and deliver to the said plaintiffs its certain paper-writing, commonly called a policy of insurance, dated the 17th day of April, 1895, whereby and wherein it did, in consideration of the stipulations contained, and further the sum of seventeen and $\frac{50}{100}$ dollars ($17.50), then and there paid to the said defendant by the Ivy City Brick Company, insure the said Ivy City Brick Company for the term of one (1) year, from the 17th day of April, A. D. 1895, at noon, to the 17th day of April, A. D.
2 1896, at noon, against all direct loss or damage by fire to an amount not exceeding one thousand dollars ($1,000.00) to the following property, all being the property of the said Ivy City Brick Company, namely: On their one-story brick and frame struc-

ture, metal roof (about 118 x 165 feet), and one-story brick and frame addition, with metal roof, including dryers, situated on their tract known as Ivy City, about one mile northeast of Washington, D. C., loss, if any, payable, as interest might appear, to Albert A. Wilson and John B. Larner, trustees, the plaintiffs herein; that by the terms of the said policy the said defendant should not be liable beyond the actual cash value of the property at the time any loss or damage occurred, and any loss or damage should be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and should in no event exceed what it would then cost the insured to replace or repair the same with material of like kind and quality, said ascertainment or estimate to be made by the insured and the said company, or, if they differ, then by appraisers, as provided in said policy, and the amount of loss or damage having been so determined, the sum for which the said company should be liable, pursuant to the said policy, shall and should be payable sixty (60) days after due notice, ascertainment, estimate, and satisfactory proofs of any loss should have been received by the said company in accordance with the terms of the said policy. It shall be optional, however, with the said company to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice within thirty (30) days after the receipt of the proof required in said policy of its intention so to do, but that there should be no abandonment to said company of the property described; that the plaintiffs herein are trustees under a deed of trust from the said Ivy City Brick Company, by which said deed of trust the said Ivy City Brick Company conveyed the property set out in said policy of insurance to the said plaintiffs in trust for the purpose of securing the payment of certain promissory notes of the said Ivy City Brick Company and the interest thereon, amounting to a large sum of money, to wit, ninety thousand dollars ($90,000.00), which notes are still outstanding and unpaid; that thereafter, to wit, on the 17th day of May, A. D. 1895, while the said policy was in full force and effect, the said property described in said policy was totally destroyed by fire, whereby said property sustained an immediate loss and damage largely exceeding in amount the said sum of one thousand dollars ($1,000.00) and, further, largely exceeding in amount the sum of all and every the insurance upon said property; that the said Ivy City Brick Company did thereafter, to wit, on the same day of said fire, the said 17th day of May, A. D. 1895, give notice of said loss in writing to the said company, and did, according to the condition contained in said policy, thereafter, to wit, on the 7th day of August, A. D. 1895, render a statement to the said company, signed and sworn to by the president of the Ivy City Brick Company, stating the time and
3 origin of the fire to his best knowledge and belief, and the interest of the insured and all others in the said property, and the cash value of each item thereof, and the amount of loss thereon; all encumbrances thereon; all other insurances, whether

valid or not, covering all of said property, and a copy of all the descriptions and schedules of all policies; and the said Ivy City Brick Company did in every respect keep, fulfill, and perform each and every the conditions and covenants in the said policy of insurance to be by it kept and performed; that immediately upon receipt of said notice it became the duty of the said defendant, within 60 days after the receipt of said notice, which said notice was duly thereafter received, to wit, on the 8th day of August, A. D. 1895, either to pay to the said plaintiffs the amount stated in said policy or to replace the said property, as is hereinbefore set out; that if the said company should have desired to avail itself of the option of replacing and repairing the said property it was required and compelled to have given notice of its intention so to do within thirty (30) days after the receipt of the proof hereinbefore set out, but the said defendant did not give the said plaintiffs or the Ivy City Brick Company notice of its desire or intention to replace and repair the said property within thirty (30) days after the receipt of said proof, nor has it ever notified the plaintiffs or the said Ivy City Brick Company of its intention so to do, but, on the contrary, the said defendant has since shortly after the day of said fire, to wit, on the 17th day of May, A. D. 1895, denied any responsibility upon the said policy of insurance or of its intention to pay any loss or damage on account of the same, whereby and by reason of the premises the said defendant became and is liable to pay to the said plaintiffs the sum of one thousand dollars ($1,000.00), as it in and by the said policy of insurance did promise to do; but, on the contrary, although often requested so to do, has not paid the said sum or any part thereof, either to the plaintiffs or the Ivy City Brick Company, to the damage of the said plaintiffs in the sum of fifteen hundred dollars ($1,500.00).

And the plaintiffs claim the sum of one thousand dollars ($1,000.00), with interest, at the rate of six per centum per annum, from the 7th day of October, A. D. 1895, until paid, besides costs of suit.

2. The plaintiffs, as trustees, further sue the defendant, a corporation duly incorporated under the laws of the State of Connecticut, but doing business and having an office in the District of Columbia, for that whereas, heretofore, to wit, on the 17th day of April, A. D. 1895, the said defendant did execute and deliver to the said plaintiffs its certain other paper-writing, commonly called a policy of insurance, dated the 17th day of April, 1895, whereby and wherein it did, in consideration of the stipulations contained and, further, the sum of seventeen and $\frac{50}{100}$ dollars ($17.50), then and there paid to the said defendant by the Ivy City Brick Company, insure the said Ivy City Brick Company for the term of one (1) year, from the 17th day of April, A. D. 1895, at noon, to the 17th day of April, A. D. 1896, at noon, against all direct loss or damage by fire to an amount

4 not exceeding one thousand dollars ($1,000.00) to the following property, all being the property of the said Ivy City Brick Company, namely, machinery of every description, dryers, cars, apparatus, and equipments and tools contained in their one-

story brick and frame structure, with metal roof (about 118 by 165 feet), and a one-story frame and brick addition, with metal roof, situate on their tract, known as Ivy City, about one mile northeast of Washington, D. C., loss, if any, payable, as interest might appear, to Albert A. Wilson and John B. Larner, trustees, the plaintiffs, herein; that by the terms of the said policy the said defendant should not be liable beyond the actual cash value of the property at the time any loss or damage occurred, and any loss or damage should be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and should in no event exceed what it would then cost the insured to replace or repair the same with material of like kind and quality, said ascertainment or estimate to be made by the insured and the said company, or, if they differ, then by appraisers, as provided in said policy; and the amount of loss or damage having been so determined, the sum for which the said company should be liable pursuant to the said policy shall and should be payable sixty (60) days after due notice, ascertainment, estimate, and satisfactory proofs of any loss should have been received by the said company in accordance with the terms of the said policy. It shall be optional, however, with the said company to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice within thirty (30) days after the receipt of the proof required in said policy of its intention so to do, but that there should be no abandonment to said company of the property described; that the plaintiffs herein are trustees under a deed of trust from the said Ivy City Brick Company, by which said deed of trust the said Ivy City Brick Company conveyed the property set out in said policy of insurance to the said plaintiffs in trust for the purpose of securing the payment of certain promissory notes of the said Ivy City Brick Company and the interest thereon, amounting to a large sum of money, to wit, ninety thousand dollars ($90,000.00), which notes are still outstanding and unpaid; that thereafter, to wit, on the 17th day of May, A. D. 1895, while the said policy was in full force and effect, the said property described in said policy was totally destroyed by fire, whereby said property sustained an immediate loss and damage largely exceeding in amount the said sum of one thousand dollars ($1,000.00) and, further, largely exceeding in amount the sum of all and every the insurance upon said property; that the said Ivy City Brick Company did thereafter, to wit, on the same day of said fire, the said 17th day of May, A. D. 1895, give notice of said loss, in writing, to the said company, and did, according to the condition contained in said policy, thereafter, to wit, on the 7th day of August, A. D. 1895, render a statement to the said company, signed and sworn to by the president of the Ivy City Brick Company,
5 stating the time and origin of the fire to his best knowledge and belief, and the interest of the insured and all others in the said property, and the cash value of each item thereof and the amount of loss thereon, all encumbrances thereon, all other in-

surances, whether valid or not, covering all of said property, and a copy of all the descriptions and schedules of all the policies, and the said Ivy City Brick Company did in every respect keep, fulfill, and perform each and every the conditions and covenants in the said policy of insurance to be by it kept and performed; that immediately upon the receipt of said notice it became the duty of the said defendant within sixty (60) days after the receipt of said notice, which said notice was duly thereafter received, to wit, on the 8th day of August, A. D. 1895, either to pay to the said plaintiffs the amount stated in said policy or to replace the said property, as is hereinbefore set out; that if the said company should have desired to avail itself of option of replacing and repairing the said property, it was required and compelled to have given notice of its intention so to do within thirty (30) days after the receipt of the proof hereinbefore set out; but the said defendant did not give the said plaintiffs or the Ivy City Brick Company notice of its desire or intention to replace and repair the said property within thirty (30) days after the receipt of said proof, nor has it ever notified the plaintiffs or the said Ivy City Brick Company of its intention so to do, but, on the contrary, the said defendant has since shortly after the day of said fire, to wit, on the 17th day of May, A. D. 1895, denied any responsibility upon the said policy of insurance or of its intention to pay any loss or damage on account of the same, whereby and by reason of the premises the said defendant became and is liable to pay to the said plaintiffs the sum of one thousand dollars ($1,000.00), as it in and by the said policy of insurance did promise to do; but, on the contrary, although often requested so to do, has not paid the said sum or any part thereof either to the plaintiffs or the Ivy City Brick Company, to the damage of the said plaintiffs in the sum of fifteen hundred dollars ($1,500.00).

And the plaintiffs claim the sum of one thousand dollars ($1,000.00), with interest, at the rate of six per centum per annum, from the 7th day of October, A. D. 1895, until paid, besides costs of this suit.

And the plaintiffs claim the sum of two thousand dollars ($2,000.00), with interest, at the rate of six per centum per annum, from the 7th day of October, A. D. 1895, until paid, besides costs of this suit.

HENRY WISE GARNETT,
Att'y for Pl'fts.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the date of the service hereof; otherwise judgment.

HENRY WISE GARNETT,
Attorney for Plaintiff.

6

Plea.

Filed Dec. 3, 1895.

In the Supreme Court of the District of Columbia.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Plaintiffs,
vs.
THE HARTFORD FIRE INSURANCE COMPANY OF THE City of Hartford, Connecticut, a Corporation, Duly Incorporated under the Laws of the State of Connecticut, Defendant.
} At Law. No. 38932.

And now comes the defendant, and for plea to the first count of plaintiffs' declaration says:
That it did not undertake and promise as is therein alleged.
And for plea to the second count of said declaration says:
That it did not undertake and promise as is therein alleged.
And for plea to the said declaration says:
That it did not undertake and promise as is alleged therein.

JOSEPH J. McNALLY,
J. WALTER WHEATLEY,
Attorneys for Defendant.

Joinder of Issue.

Filed Dec. 12, 1895.

In the Supreme Court of the District of Columbia.

ALBERT A. WILSON ET AL., Plaintiffs,
vs.
THE HARTFORD FIRE INSURANCE COMPANY, etc., Defendant.
} At Law. No. 38932.

The plaintiffs join issue on the defendant's pleas.

HENRY WISE GARNETT,
Attorney for Plaintiffs.

Agreed Case.

Filed Jun-15, 1898.

In the Supreme Court of the District of Columbia.

ALBERT A. WILSON ET AL., Plaintiffs,
vs.
THE HARTFORD FIRE INSURANCE COMPANY of the City of Hartford, Connecticut, Defendant.
} At Law. No. 38932.

1. Prior to April 17th, 1895, C. C. Duncanson, treasurer of the Ivy City Brick Company of the City of Washington, D. C.,

authorized the firm of Tyler & Rutherford, of said city, at their request, to place insurance for the company, loss, if any, ıyable to Albert A. Wilson *et al.*, trustees under a deed of trust ven by said company, as interest might appear, said Duncanson :erring the amount to be placed to be the sum of ten thousand ollars ($10,000), and Tyler & Rutherford averring a much larger ım.

On said April 17th, 1895, said Tyler & Rutherford, under the foresaid authority, proposed to one Barrett, an agent, at said city f Washington, of the Hartford Fire Insurance Company of Hartord, Connecticut, for insurance on properties of the said Ivy City Brick Company.

2. Said Barrett stated to said Tyler & Rutherford that the proosed risk was a special hazard, and that he doubted his authority o accept it before reference to his principal, but that he would issue olicies amounting to $2,000, equally divided on the buildings and machinery, upon the condition that the same should be held by the aid Tyler & Rutherford, and not delivered to their principals until he decision of the Hartford Fire Insurance Company on the acceptnce of the risk was duly had, and should be subject to immediate ancellation (the 5-days' notice in the policy conditions being waived) by notice that said company rejected the risk.

3. This condition was accepted by said Tyler & Rutherford, and the two policies of insurance in the declaration set forth were thereupon written and placed in their hands.

4. A short time thereafter, to wit, on the 27th day of April ensuing, on the first inspection visit to Washington after the issue of said policies, William R. Royce, the special agent of the Hartford Fire Insurance Company, known by said Tyler & Rutherford to be the representative of the company, having authority to inspect, confirm, or cancel risks for and in behalf of said company, went to the office of said Tyler & Rutherford and informed them that the Hartford Fire Insurance Company refused to carry the risk and ordered the cancellation of the said policies, and on the same day the said Barrett, being on his way to the office of Tyler & Rutherford, met R. K. Tyler, a member of that firm, who had made the negotiation for the policies, had the same in his custody, and had exclusive charge of the matter, and announced to him that the company ordered their cancellation; to which the said Tyler responded, "All right; send up and get them."

5. The said Barrett sent three times to the office of Tyler & Rutherford for the policies. Each time his employee was informed by one of the clerks of Tyler & Rutherford that Mr. R. K. Tyler, who had charge of the policies, was absent from the office, and they would have to see him.

6. Said Barrett was taken sick and did not appear at his office for some days, but had immediately ordered the entry clerk to make the customary entry in such cases on the register where the policies were noted, "Cancelled by order of company," which was accordingly done.

7. On the first day of May ensuing the customary mutual
8 accounts of business between the offices of said Barrett and said Tyler & Rutherford were settled, and the two policies were treated as dead, no charge for their premiums being presented on the one hand or asked for on the other.

(MEM.—Of the facts recited in the second clause of paragraph 1 and in paragraphs 2, 3, 4, 5, 6, and 7 above set forth, no party connected with or interested by mortgage or otherwise in the Ivy City Brick Company had any knowledge until after the fire occurred.)

8. The existence of the two policies was never reported to the said Duncanson nor to any one connected with said Ivy City Brick Company by mortgage or otherwise, nor did he or they have any knowledge of or connection with said policies until they came into the hands of said Duncanson on May 16th, 1895, and at no time prior to the fire had any party connected with or interested, by mortgage or otherwise, in the Ivy City Brick Company any knowledge of the transaction between said Barrett and said Tyler & Rutherford hereinbefore set forth.

9. The two policies had been overlooked by Tyler & Rutherford and lay in the drawer along with a number of other policies issued by other insurance companies which had been secured by said Tyler & Rutherford for the purpose of filling the above order. Of this fact no one connected with the Ivy City Brick Company in any interest whatever was informed until after the fire.

10. Tyler & Rutherford had found great difficulty in procuring the desired insurance, and aver that the entire amount proposed was never secured. Some of the agencies insisted on the same conditions as to cancellations as those fixed between said Barrett and said Tyler & Rutherford, and cancellations by orders of the different companies were so frequent that said Tyler & Rutherford could not at any time before May 16th know how much of binding insurance was in hand. Of all these facts the said R. K. Tyler avers that he informed the said Duncanson in the progress of the effort to secure insurance and some time prior to the fire. The said Duncanson denies that he had information as to any of these facts at any time prior to the fire, except the fact that there was difficulty in procuring the desired insurance. No specific mention, however, of the two policies of the defendant was made to said Duncanson, or any one connected in any interest with the Ivy City Brick Company.

11. On the 16th of May, 1895, a clerk of Tyler & Rutherford was directed to make up the account of the policies on hand and put them in a package for delivery. The two policies of the Hartford Fire Insurance Company, which had been overlooked and were then lying in the same drawer with the other policies, taken in fulfillment of this order, were included in the account and placed in the package with said other policies by said clerk of Tyler & Rutherford without the personal knowledge of said Tyler & Rutherford, and both were handed to said Duncanson by said R. K. Tyler, said Tyler not examining the same. Said Duncanson took the package and

gaged to pay the account on the Monday week following, to wit, May 27, 1895.

12. On the morning of May 17th, after the fire which occurred about one o'clock a. m., on that day, said R. K. Tyler came said Duncanson and asked for the return of the two policies, ting that they had been handed him by mistake and the fact of ir previous cancellation, said Tyler averring that he did not ow that the property described as insured had been destroyed. ter, on that day, when the fact was known that the property de- ibed in the policies was destroyed, Tyler & Rutherford, by tele- one, informed the Washington Loan & Trust Company, the bene- iary of the trust held by Wilson *et al.*, trustees, that the Hartford licies had been delivered by mistake and requested it to send ck the two policies, and were answered that they were locked up, t would be returned the next morning.

Of this request and answer by the telephone it is agreed that the y City Brick Company knew nothing at the time, and when in- rmed of said request directed that the policies be not returned. ie policies were not returned, and sundry correspondence followed tween said Tyler & Rutherford, said Duncanson, and the Wash- gton Loan & Trust Company, in the course of which said Dun- nson sent a check to Tyler & Rutherford for the settlement of e account above referred to. Tyler & Rutherford refused said ttlement, stating that the two policies of the Hartford were void d had been sent in by mistake, and returned the check, with a rrected account, excluding these policies. The correspondence tween said Duncanson, said Tyler & Rutherford, and said Wash- gton Loan & Trust Company and the policies sued on may be ed with this statement and considered as part of this agreed case.

13. Defendant waives any claim of laches or irregularity as to otice of loss, or as to the particular account commonly called proof loss.

14. The parties hereto reserve the right to except to the rulings the court on the aforegoing agreed case. The court shall be con- dered as having directed the jury to find a verdict in favor of the rty for whom the court itself shall find in accordance with the ipulation following, and either party hereto shall be considered as aving filed an objection to such ruling or rulings of the court and aving duly taken exception thereto, and said party so excepting hall be allowed an appeal thereon to the Court of Appeals, and this greed case shall be filed in the said court as the proper bill of xceptions herein.

On the above state of facts it is agreed that should the court find r the plaintiff judgment shall enter for $2,000, with interest from ctober 7th, 1895, and costs.

And should the court find for the defendant, judgment shall enter r the defendant with costs.

BLAIR & THOM,
Attorneys for Plaintiff.
WOLF & ROSENBERG,
Attorneys for Defendant.

10 (Endorsed:) Let the term be extended to settle the bill of exceptions in this case. Dec. 30, '99. A. C. Bradley, J.

Correspondence Referred to in Agreed Case.

Filed Dec. 9, 1899.

MAY 14'' 5

IVY CITY BRICK CO.

No. policy.	Date.	Company.	Insured.	Am't.	Premium.
300048	Apr. 17, '95	Hanover Ins. Co. of N. Y.	Ivy City Brick Co., on buildings.	1,000	1,750
20230	" " "	Underwriters, Hartford.	Do. do.	1,000	1,750
2408	" 18, "	Orient of Hartford...	Do. do.	1,000	1,750
2273	" " "	Pacific of N. Y.	Do. do.	750	1,313
251636	" " "	Reading of Pa.....	Do. do.	750	1,313
300047	" 17, "	Hanover of N. Y. ..	Machinery. ..	1,000	1,750
20229	" " "	Underwriters of Hartford.	Do.	1,000	1,750
2407	" 18, "	Orient of Hartford...	Do.	1,000	1,750
716975	" 19, "	American Central of St. Louis.	Do.	1,000	1,750
251635	" 18, "	Reading of Pa.	Do.	750	1,313
2272	" " "	Pacific of N. Y.	Do.	750	1,313
					$17,502

Above policies herewith to C. C. Duncanson by messenger.

This paper, it is agreed, was delivered May 16, 1895, and is the list of policies referred to in paragraph 11 of the agreed case.

Tyler & Rutherford, real estate, loans, and insurance, office 1307 F street northwest.

WASHINGTON, D. C., *May* 17, 1895.

Ivy City Brick Co., addressed.

GENTLEMEN: Please return us policies Nos. 20229 and 20230 of the Underwriters' Ins. Co. of Conn. These policies were ordered cancelled shortly after they were issued, and were delivered to you by mistake of one of our employés. We send you herewith the letter of the agent of the Underwriters' New York agency, which explains itself. Please return the enclosed letter with the policies by bearer and oblige,

Yours truly, TYLER & RUTHERFORD.

1 enclosure.

Thos. F. Barrett & Co., real estate and insurance brokers, 519 12th street northwest, Washington, D. C., gen'l ag'ts, District of Columbia, for Standard Life and Accident Ins. Co. of Detroit, Mich.

...een of America, of N. Y.; Hanover, of N. Y.; New York Underwriters, of N. Y.; Firemen's, of Newark, N. J.

MAY 17TH, 1895.

...ssrs. Tyler & Rutherford, agents, city.

GENTLEMEN: I desire to call your attention again to the fact that ...licies # 20229, 20230, of the Underwriters' agency of New York ...ve not yet been returned to this office. The policies are dated ...ril 17th, 1895; that within a few days after they were written we ...ceived a request from the company for their immediate cancella... and return. This was followed by a personal visit of the spe... agent, Mr. Royce, to your office, who again requested their re... Since that time we have made repeated requests for the ...urn of the policies. We hope you will return them to us at once ...d oblige,

Yours truly, THOS. F. BARRETT & CO.

WASHINGTON, D. C., *May 18th*, 1895.

...ssrs. Tyler & Rutherford, agents, city.

GENTLEMEN: You are hereby notified that a fire took place at the ...y City Brick Company plant yesterday morning, and considerable ...ss was occasioned by same. Being desirous to remove the debris ... soon as possible, for the purpose of making arrangements to re...ild, we desire you to notify the companies immediately who have ...surance on said plant.

Please inform us whether we can go ahead.

Yours respectfully, IVY CITY BRICK CO.,
By C. C. DUNCANSON, *Treasurer*.

MAY 18, 1895.

...C. Duncanson, Esq., treasurer Ivy City Brick Co., addressed.

DEAR SIR: We have your favor of this date and, as requested, will ...tify the companies interested in the loss upon the plant of the Ivy ...ty Brick Company, recently damaged by fire. Pending the arrival ... adjusters for the insurance companies, it is the duty of the assured ... take such measures for the protection of the property from further ...mage as they would if it were not insured.

Yours truly, TYLER & RUTHERFORD.

MAY 20, 1895.

...C. Duncanson, Esq., treasurer Ivy City Brick Co., addressed.

DEAR SIR: We own your favor of 17th instant with check for ...75.02 for premiums on insurance for account of the Ivy City Brick ... We return your check herewith with a corrected account. The

12 Underwriters' policies were ordered cancelled shortly after they were issued and were sent to you or the trust company by mistake. Please send check for enclosed corrected account and return us the policies of the Underwriters. Your prompt attention will oblige,

Yours truly, TYLER & RUTHERFORD.

2 enclosures.

Corrected.

MAY 20'' 5

IVY CITY BRICK CO.

No. policy.	Date.	Company.	Insured.	Am't.	Premium.
300048	Apr. 17, '95	Hanover Ins. Co. of N. Y.	Ivy City Brick Co., on buildings.	1,000	1,750
2408	" 18, "	Orient of Hartford...	Do. do.	1,000	1,750
2273	" " "	Pacific of N. Y.....	Do. do.	750	1,313
251636	" " "	Reading of Pa	Do. do.	750	1,313
300047	" 17, "	Hanover Ins. Co. of N. Y.	Ivy City Brick Co., on machinery.	1,000	1,750
2407	" 18, "	Orient of Hartford...	Do. do.	1,000	1,750
716975	" 19, "	American Central of St. Louis.	Do. do.	1,000	1,750
251635	" 18, "	Reading of Pa.	Do. do.	750	1,313
2272	" " "	Pacific of N. Y.	Do. do.	750	1,313
					$14,002

Above policies delivered by messenger to C. C. Duncanson May 14, '95.

John B. Larner, attorney and counsellor at law; offices, Adams building, 1335 F street.

WASHINGTON, D. C., *May* 20, '95.

Messrs. Tyler & Rutherford, Washington, D. C.

GENTLEMEN: The parties in interest in the matter of the Ivy City Brick Company's recent loss have called upon us, as trustees to whom the policies are payable, to take the necessary steps for the collection of the amount of the loss.

Kindly advise us what course you desire pursued in the matter in regard to the eleven policies which bear the stamp of your firm. There are five other policies upon the property, but we will communicate directly with the agent having charge of them, in regard to their collection.

We do not desire to take any unnecessary steps in this matter and would be obliged if you would furnish us with the information requested above. If proofs of loss are necessary, kindly send us the blanks.

Yours very truly, A. A. WILSON &
JOHN B. LARNER,
Trustees.

Dictated. L.

13 John B. Larner, attorney and counsellor at law; offices, Adams building, 1335 F street.

WASHINGTON, D. C., *May* 23, '95.

Tyler & Rutherford, Washington, D. C.

GENTLEMEN: Referring to the conversation I had with your Mr. Tyler yesterday over the telephone in regard to the recent loss of the I. C. Brick Co., I would state that Mr. Duncanson has positively notified me that he did not receive any notice of any kind from you advising him of the withdrawal of the two policies issued by the Underwriters' Association of New York and delivered by you May 14th until after the fire. He also advises me that the I. C. Brick Co. insists upon the trustees claiming their rights under these two policies.

Inquiry at the office of the Washington L. & T. Co. reveals the fact that no notice of the withdrawal of these policies was given that company or any of its officers until after the fire.

Neither Mr. Wilson nor myself as trustees received any such notice.

It therefore remains the duty of the trustees to insist upon a strict compliance with the terms of these policies.

Yours very truly, JOHN B. LARNER.

Dictated. L.

Tyler & Rutherford, real estate, loans, and insurance; office, 1307 F street northwest.

WASHINGTON, D. C., *May* 25, 1895.

John B. Larner, Esq., 1335 F street N. W., city.

DEAR SIR: We own your favor of 23rd instant, and note what you say with reference to insurance recently placed by us for account of the Ivy City Brick Co. There seems to be an erroneous impression respecting our position in this matter. We do not claim to have communicated the notice of cancellation of the Underwriters' policies to the assured prior to the fire. It had been our intention to hand these policies back to the agent who issued them, but by mistake of our office they were delivered to the trust company with other policies. As we were acting solely for the assured in the matter, we see no reason why it should be sought to gain advantage by refusing to return the policies which were delivered by mistake, and which were void at the time of said delivery. We can but regard the action of the assured in this matter as an exhibition of bad faith, and, understanding that the matter is now in your hands, we request that you return the Underwriters' policies to us, to be handed over to the agent of the company.

Yours truly, TYLER & RUTHERFORD.

14 MAY 29, 1895.

C. C. Duncanson, Esq., treas. Ivy City Brick Co., 9th & D Sts. N. W., city.

DEAR SIR: We have received no response to our letter of 20th instant enclosing a corrected account for the insurance obtained by us for account of the Ivy City Brick Company. The agents of the companies from whom we obtained this insurance are pressing us for the payment of the premium. We therefore request that you send us a check, as per corrected bill referred to, in order that we may make settlement with them. Your prompt attention to this matter will very much oblige,

Yours truly, TYLER & RUTHERFORD.

JUNE 12, 5.

Mr. C. C. Duncanson, for Ivy City Brick Co.

Apr. 17, '95	300048	Hanover of N. Y.	Buildings	1,000	1,750
" 18, "	2408	Orient " Conn	"	1,000	1,750
" " "	2273	Pacific " N. Y	"	750	1,313
" " "	251636	Reading " Pa	"	750	1,313
" 17, "	300047	Hanover " N. Y	Machinery	1,000	1,750
" 18, "	2407	Orient " Conn	"	1,000	1,750
" " "	2272	Pacific " N. Y	"	750	1,313
" " "	251635	Reading " Pa	"	750	1,313
" 19, "	716975	Am. Central of St. Louis	"	1,000	1,750
					14,002

O K, June 12th, 1895.

TYLER & RUTHERFORD.

Supreme Court of the District of Columbia.

FRIDAY, *December* 13, 1899.

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Plaintiffs,
vs.
THE HARTFORD FIRE INSURANCE COMPANY of the City of Hartford, Connecticut, a Corporation, Defendant. } At Law. No. 38932.

And now comes here, as well the plaintiffs, by their attorneys, Messrs. Blair & Thom, as the defendant, by its attorneys, Messrs. Wolf & Rosenberg, and submit this case to the court upon an agreed statement of facts, and the same having been *been* heard and fully understood, the court finds the issues joined in favor of the defendant. Therefore it is considered that the plaintiffs take nothing by their suit and the defendant go thereof without day and recover against said plaintiffs its costs of defense, to be taxed by the clerk, and have execution thereof.

15 *Order to Enter Appeal.*

Filed Dec. 19, 1899.

In the Supreme Court of the District of Columbia, the — Day of December, 1899.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, *vs.* THE HARTFORD FIRE INSURANCE COMPANY. } At Law. No. 38932.

The clerk of said court will please enter an appeal to the Court of Appeals in the above-entitled cause and issue citation.

BLAIR & THOM,
Attorneys for Plaintiffs.

Memorandum.

December 21, 1899.—Appeal bond filed.

Supreme Court of the District of Columbia.

SATURDAY, *December* 30, 1899.

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Plaintiffs, *vs.* THE HARTFORD FIRE INSURANCE COMPANY of the City of Hartford, Connecticut, Def't. } At Law. No. 38932.

It is ordered that the term be, and hereby is, prolonged for the period of thirty days for the purpose of settling exceptions in the above cause.

In the Supreme Court of the District of Columbia.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, *vs.* THE HARTFORD FIRE INSURANCE COMPANY. } At Law. No. 38932.

The President of the United States to the Hartford Fire Insurance Company, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the case therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 19th day of December, 1899, wherein Albert A. Wilson and John B. Larner, trustees, are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

16 Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 19th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 21st day of December, 1899.

WOLF & ROSENBERG,
Attorneys for Appellee.

Order Settling Bill of Exceptions.

Filed Jan. 9, 1900.

In the Supreme Court of the District of Columbia.

ALBERT A. WILSON ET AL., Plaintiffs,
vs.
THE HARTFORD FIRE INSURANCE COMPANY, Defendant.
} At Law. No. 38932.

This cause came on to be heard on an agreed case, and, having been considered by the court, was adjudged in favor of the defendant; whereupon the plaintiffs, by their attorney, duly excepted to the ruling of said court, and in accordance with the terms of the agreed case filed herein the same is this ninth day of January, A. D. 1900, duly signed and sealed by the court as the proper bill of exceptions in said cause, *nunc pro tunc.*

A. C. BRADLEY, *Justice.* [SEAL.]

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 30, inclusive, contain a true and correct transcript of the record (as prescribed by rule 5 of the Court of Appeals of the District of Columbia) in cause No. 38932, at law, wherein Albert A. Wilson *et al.* are plaintiffs and The Hartford Insurance Company is defendant, as the same remain- upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 10th day of January, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 959. Albert A. Wilson *et al.*, trustees, appellants, *vs.* The Hartford Fire Insurance Co. Court of Appeals, District of Columbia. Filed Jan. 11, 1900. Robert Willett, clerk.

17 *Addition to Record per Stipulation of Counsel.*

Court of Appeals of the District of Columbia, January Term, 1900.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Appellants,
vs.
THE HARTFORD FIRE INSURANCE COMPANY. } No. 959.

Filed February 12, 1900.

Underwriters' Policy.

No. 20229. $1,000.

By this policy of insurance, the Hartford Fire Insurance Company, of the city of Hartford, in the State of Connecticut, in consideration of the stipulations herein named and of seventeen and $\frac{50}{100}$ dollars premium does insure Ivy City Brick Company for the term of one year from the 17th day of April, 1895, at noon, to the 17th day of April, 1896, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding*ly* one thousand dollars to the following-described property while located and contained as described herein, and not elsewhere, to wit: Ivy City Brick Company. $1,000. On machinery of every description, dryers, cars, apparatus, equipments and tools, contained in their one-story brick and frame structure with metal roof (about 118 x 165 feet) and one-story frame and brick addition with metal roof. Situate on their tract known as "Ivy City" about one mile northeast of Washington, D. C. Other concurrent insurance permitted without notice until required. Loss, if any, payable as interest may appear to Albert A. Wilson and John B. Larner, trustees. (Mortgagees' clause with full contribution attached.) Attached to and made a part of policy No. 20229 of the N. Y. Underwriters' agency.

THOS. F. BARRETT, *Agents.*

18 This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value,

and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than 10 o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within-described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adja-
19 cent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naptha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or

military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulation, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of

property remaining in the original location shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing, by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

21 The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and

ling to agree, shall submit their differences to the umpire; and
e award in writing of any two shall determine the amount of such
ss; the parties thereto shall pay the appraiser respectively selected
them and shall bear equally the expenses of the appraisal and
mpire.

This company shall not be held to have waived any provision or
ndition of this policy or any forfeiture thereof by any require-
ent, act, proceeding on its part relating to the appraisal or to any
amination herein provided for; and the loss shall not become
yable until sixty days after the notice, ascertainment, estimate,
d satisfactory proof of the loss herein required have been received
this company, including an award by appraisers when appraisal
s been required.

This company shall not be liable under this policy for a greater
oportion of any loss on the described property, or for loss by and
pense of removal from premises endangered by fire, than the
mount hereby insured shall bear to the whole insurance, whether
lid or not, or by solvent or insolvent insurers, covering such prop-
ty, and the extent of the application of the insurance under this
olicy or of the contribution to be made by this company in case of
ss, may be provided for by agreement or condition written hereon
attached or appended hereto. Liability for reinsurance shall be
specifically agreed hereon.

If this company shall claim that the fire was caused by the act or
glect of any person or corporation, private or municipal, this
mpany shall, on payment of the loss, be subrogated to the extent
such payment to all right of recovery by the insured for the loss
sulting therefrom, and such right shall be assigned to this com-
ny by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim,
all be sustainable in any court of law or equity until after full
mpliance by the insured with all the foregoing requirements, nor
nless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be
eld to include the legal representative of the insured, and wherever
e word "loss" occurs, it shall be deemed the equivalent of "loss
or damage."

2 If this policy be made by a mutual or other company having
special regulations lawfully applicable to its organization,
embership, policies, or contracts of insurance, such regulations
all apply to and form a part of this policy as the same may be
ritten or printed upon, attached, or appended hereto.

This policy is made and accepted subject to the foregoing stipula-
ons and conditions, together with such other provisions, agree-
ents, or conditions as may be indorsed hereon or added hereto
nd no officer, agent, or other representative of this company shall
ave the power to waive any provision or condition of this policy
xcept such as by the terms of this policy may be subject of agree-
ent indorsed hereon or added hereto, and as to such provisions
nd conditions no officer, agent, or representative shall have such
ower or be deemed or held to have waived such provisions or con-

ditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

In witness whereof, this company has executed and attested these presents this seventeenth day of April, 1895.

This policy shall not be valid until countersigned by the duly
3500
authorized agent of the company at Washington, D. C.

GEO. L. CHASE, *President.*
P. C. ROYCE, *Secretary.*
THOS. TURNBULL,
Ass't Secretary.
CHAS. E. CHASE,
2d Ass't Secretary.

Countersigned by—
THOS. F. BARRETT, *Agent.*

Court of Appeals, District of Columbia.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Appellants, *vs.* THE HARTFORD FIRE INSURANCE COMPANY, Appellee. } No. 959.

It is hereby stipulated and agreed that the aforegoing is a copy of one of the policies sued on in the above-entitled cause, referred to in the agreed case, in paragraph 12 thereof, filed as a part of said agreed case, and also referred to in the correspondence filed with said agreed case. It is further stipulated and agreed that the other policy is similar except as to the property covered by the loss, that said policy was omitted from the record through inadvertence,
23 and that this copy may be filed and printed as a part of the record herein.

BLAIR & THOM,
Attorneys for Appellants.
WOLF AND ROSENBERG,
Attorneys for Appellee.

(Endorsed:) No. 959. Albert A. Wilson *et al.*, appellants, *vs.* Hartford Fire Insurance Company. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Feb. 12, 1900. Robert Willett, clerk.

24 THURSDAY, *May 10th, A. D.* 1900.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Appellants, *vs.* THE HARTFORD FIRE INSURANCE COMPANY. } No. 959.

The argument in the above-entitled cause was commenced by Mr. Henry P. Blair, attorney for the appellants, and was continued by

r. Samuel B. Paul, attorney for the appellee, and was concluded
Mr. Henry P. Blair, attorney for the appellants.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Appellants,
vs.
THE HARTFORD FIRE INSURANCE COMPANY.
No. 959.

Opinion.

Mr. Justice SHEPARD delivered the opinion of the court:

1. This suit was brought by Albert A. Wilson and John B. Lar-r, trustees, upon two policies of insurance covering $1,000 on cer-in buildings and $1,000 on machinery of the Ivy City Brick ompany for one year from April 17, 1895. Both policies were made ayable to said trustees as their interest may appear.

The policies are simple contracts of the standard form, two of the ipulations of which, only, are of any importance in the determina-on of the case. These are: (1) "This policy shall be canceled at ny time at the request of the insured; or by the company by giv-g five days' notice of such cancel-ation. (2) This policy is made d accepted subject to the foregoing stipulations and conditions, gether with such other provisions, agreements or conditions as ay be indorsed hereon or added hereto, and no officer, agent, or her representative of this company shall have the power to waive y provision or condition of this policy except such as by the terms this policy may be subject of agreement indorsed hereon or added reto, and as to such provisions and conditions no officer, agent, or presentative shall have such power or be deemed or held to have aived such provisions or conditions unless such waiver, if any, all be written upon or attached hereto, nor shall any privilege or rmission affecting the insurance under this policy exist or be aimed by the insured unless so written or attached."

An agreed statement was made of the facts that each party could rove, and with a reservation of the right of exception to all rulings the court made thereon, the case was thereon submitted, and judg-ent was entered for the defendant.

2. From the agreed statement it appears:

(1.) That Tyler and Rutherford, insurance brokers, were requested y the Ivy City Brick Company to obtain insurance upon its prop-rty for the sum of $10,000; and that they applied to Barrett, the cal agent of defendant at Washington, for policies covering $2,000 f the risk.

"(2.) Said Barrett stated to said Tyler & Rutherford that the pro-osed risk was a special hazard, and that he doubted his authority accept it before reference to his principal, but that he would issue olicies amounting to $2,000, equally divided on the buildings and achinery, upon the condition that the same should be held by the id Tyler & Rutherford, and not delivered to their principals until e decision of the Hartford Fire Insurance Company on the accept-nce of the risk was duly had, and should be subject to immediate

cancel-ation (the 5 days' notice in the policy conditions being waived) by notice that said company rejected the risk.

(3.) This condition was accepted by said Tyler & Rutherford, and the two policies of insurance in the declaration set forth were thereupon written and placed in their hands."

(4.) On April 27, 1895—ten days after the delivery of the policies aforesaid—defendant's special agent came to Washington, and informed Tyler & Rutherford that defendant "refused to carry the risk, and ordered the cancel-ation of said policies." On the same day Barrett met Tyler—who had negotiated the insurance and had the policies—and notified him that the defendant ordered their cancel-ation. Tyler responded: "All right; send up and get them."

(5.) Barrett sent three times to Tyler & Rutherford for the policies, but did not obtain them, because, as his messenger was informed, Tyler, who had charge of the policies, was absent and would have to be seen.

(6.) Barrett became ill and did not appear at his office for some days; but he had immediately ordered his entry clerk to note on the register of these policies: "Canceled by order of company." And this was done, but the date does not appear.

(7.) On May 1, according to custom, accounts between Barrett and Tyler & Rutherford were settled, but no charge for premiums was presented or made; the policies being treated as dead.

(8.) The existence of the policies was not made known to the insured or any one interested therefor, until May 16, 1895, when it became possessed of them. Nor had the insured any knowledge of the transactions between Barrett and Tyler & Rutherford.

(9.) The policies, until May 16, 1895, remained in the office of Tyler & Rutherford along with some other policies that had been obtained under the original order.

26 (10.) On May 16, 1895, a clerk of Tyler & Rutherford was ordered by them to make up the account for premiums due on the policies obtained for the brick company and put them in a package for delivery. The package, including the policies sued on, was handed, with the account, to Tyler by the representative of the brick company; but Tyler did not examine the package and did not know that the policies were inclosed.

(11.) The account included the premium charges for the two policies. The brick company's representative received the package and engaged to pay the account on May 27, 1895.

(12.) On May 17, 1895, the property was destroyed by fire. On the same day, and after the fire, Tyler, averring that he did not know the property had been destroyed, demanded the return of the two policies of the party to whom he had delivered them, stating that they had been canceled and that he had delivered them by mistake. Later, on the same day, Tyler & Rutherford gave the same notice and made the same demand of the representative of the beneficiaries of the trust.

(13.) The brick company directed the holding of the policies; and sent a check to Tyler & Rutherford for the amount of the account rendered, including the premiums on these two policies.

ey refused to receive the money for the premiums on these pol-
s, declaring that they were void and had been delivered by mis-
e, and made up and transmitted a new account for premiums
e, omitting these.

3. No question has been raised as regards the fact that no pay-
nts of the premiums of the policies had been received by the de-
dant; it being conceded that the customary credit and settling
angements between the respective parties and their agents and
okers were equivalent to payments, under the conditions of the
licies, in so far as they may depend thereupon for their validity.

1. The first question raised on the argument relates to the scope
the agency of Tyler & Rutherford for the insured.

That they were agents authorized, by virtue of their employment,
represent the insured in all matters relating to the negotiation of
contracts, and to bind it by their representations and state-
nts until, at least, the agency might be terminated by the final
livery of the executed policies, cannot be denied. The particular
tent and legal effect of this agency became material, only, in con-
dering the branch of the defense founded on that part of the agreed
tement respecting the cancel-ation of the policies—treating can-
l-ation, as therein used, as the act of terminating or rescinding con-
cts actually in force until canceled.

From the terms of the agreed statement, it appears that the local
ent of the insurer, who was possessed of signed policies and au-
orized to fill the blanks, deliver them, and bind his principal
ereby, regarded the policies as in force, at least, until disapproved
the company, and therefore subject to the reserved power of can-
l-ation, notwithstanding the conditional delivery, hereafter to be
nsidered separately.

As regards the oral waiver of the five days' notice of cancel-ation,
acted of the brokers at the time of their delivery, it is not neces-
ry to consider the effect of the express condition, in each policy,
at additional stipulations, or waivers of those contained, in order
bind, shall be indorsed thereon, because the notice of cancel-ation,
effective as such, was in fact given more than five days before the
s occurred. The notice of cancel-ation was given to the brokers,
d demand made of them for the return of the policies. None was
ven to the insured, and it had no knowledge of the fact from any
urce whatever.

There is nothing in the agreed statement to warrant the conclu-
on that the brokers' agency or employment extended any farther
an the procurement of the policies. When executed and deliv-
ed—assuming for present purposes that the delivery was uncondi-
onal and complete—their agency and employment ended. Notice
them of cancel-ation was not the notice stipulated for in the pol-
ies, and was, therefore, ineffectual. Grace *v.* American Central Ins.
., 109 U. S., 278, 282.

In that case, it is true that the policy had passed into the actual
ossession of the insured before the notice of cancel-ation was given
the broker, who accepted the notice and promised the surrender
the policy; but we cannot agree that this fact authorizes any lim-

itation of the broad rule of the decision. It would be inconsistent with the general principles of the law of agency, applied in that decision, to hold, that because a policy is suffered to remain in the hands of the agent for its procurement, he thereby becomes the general agent of the insured—for that would be the necessary effect—with power to alter, to rescind and to accept notice of cancel-ation and bind the insured without his knowledge or consent. To give such effect to the mere possession of the policy, after execution and delivery, would be, not only to revive a limited agency, for no reasonable purpose, but also to extend it and invest it with powers that had not previously been given. Moreover, it would be fraught with great danger to the vast interests dependent upon insurance, without any general, compensating benefit to any other interest.

Merely permitting the policies to remain, for a time and uncalled for, in the hands of the brokers, which is all that this record discloses, is perfectly consistent with the idea of the termination of their agency.

With the receipt of the policy a new relation is created between the insured and the broker, namely, that of depositor and depositary: the possession of the broker, becomes, in law, the possession of the insured and nothing more; his sole duty and authority, in the new relation, is to deliver the policy upon demand of the insured, or within a reasonable time without demand.

5. This brings us to the last ground of defense, the one chiefly relied on by the appellant, and upon which the decision was made to turn in the court below. The proposition—probably stated more broadly than is justified by the recitals of the agreed statement—is that the policies were not intended to take effect, or become binding as completed contracts, because of the express condition of their delivery to the brokers.

27 Now, it is quite clear that the brokers cannot be regarded, in any conceivable legal sense, as the agents of the insurer in this matter of delivery, and, it is fair to add, there has been no such contention. On the other hand, upon principles hereinabove stated, the brokers are to be considered as the agents of the insured for all purposes connected with the negotiation and final delivery of the executed policies; and the question will, therefore, be considered as if the conditional delivery had been made directly to the insured without their intervention.

The research of counsel has not produced a reported case in which the question of a conditional delivery of a policy of insurance, as here presented, has been determined. The case of Insurance Co. *v.* Webster, 6 Wall., 129, cited on behalf of the appellant, cannot be regarded as controlling. There, the policy was accepted from an agent in Michigan, upon a condition in writing, executed by the insured, that it should not take effect until approved by the general agent at Buffalo, New York. The premium had been paid at the time of delivery. The general agent disapproved the risk and ordered the issuing agent to return the premium and *cancel* the policy. This he failed to do, whilst engaged in an attempt to have the policy finally approved. Whilst this was going on the loss occurred. The

premium was then tendered to the insured, with notice that his application had been rejected. The court said that, from all the facts and circumstances in evidence, in connection with the authority and conduct of the two agents, it was apparent that, notwithstanding the strict letter of the executed condition of receipt, the policy was not intended to be a nullity pending the matter of its approval. Hence, as there was no notice to the insured and no tender of return of premium until after the loss, the policy was declared enforceable. In the case at bar, the premium, if charged at all to the brokers, was charged off, the risk was rejected within an apparently reasonable time, and notice was given to them while they held the policy under the condition, if that condition be available at all.

Nor are the decisions cited on behalf of the appellee any more controlling. These are: Quebec Bank, etc., *v.* Hellman, 110 U. S., 178; Belleville Bank *v.* Borneman, 124 Ill., 205; Merchants' Ex. Bank *v.* Luckow, 37 Minn., 542; Benton *v.* Martin, 52 N. Y., 570; Reynolds *v.* Robinson, 110 N. Y., 654; Brown *v.* American Central Ins. Co., 70 Iowa, 390; Harnickell *v.* N. Y. Life Ins. Co., 111 N. Y., 390.

The first five of the foregoing cases need not be reviewed, for the doctrine enounced in each, so far as they bear upon the question to be decided, is to be found in a recent decision of the Supreme Court of the United States, the opinion in which reviews some of them. Burke *v.* Dulaney, 153 U. S., 228. In that case suit was brought by the payee of a negotiable promissory note, in the usual form, against the maker. Evidence was held admissible to show that the note was delivered upon a distinct verbal agreement that it should not become operative as a note until the maker could examine the property for which it was given, and determine whether he would conclude the purchase. There was no other writing relating to the contract of purchase. The evidence did not tend, it was said, to contradict or vary a written contract, but to show that it never went into effect, never in fact became the contract of the parties, because the condition upon which it was to become operative had not transpired.

In Brown *v.* American Ins. Co., *supra*, the policy was not delivered to the insured, but was deposited with a third person to hold until notified of acceptance by the company. His possession was in law that of the company. Had that course been pursued in this case, there would be little difficulty.

In Harnickell *v.* N. Y. Life Ins. Co., *supra*, the facts are peculiar. The defendant's agent entered into negotiations with Harnickell, who was then heavily insured in other companies. He agreed to take two large policies in the New York Life, provided the agent would give certain credits upon the first premium, and procure a settlement or surrender of his existing policies, upon terms satisfactory to Harnickell. Pending the negotiations for this surrender, the agent brought the new policies to Harnickell with the notes for him to execute. The agent had no power to amend or add any condition to the policies.

Harnickell agreed to deliver his notes and to receive the policies,

upon the express condition that the agent was to complete the performance of the agreement respecting the policies in the other companies.

The terms of this condition were fully expressed in writing signed by both Harnickell and the agent; but the fact was not communicated by the agent to the company. The agent failed to complete the arrangement of the old policies and declined to do so. Harnickell then returned the policies and demanded the return of his notes.

This being refused, he brought his action to compel the surrender of his notes, and was awarded the relief prayed for. The court said the question was not in respect of the agent's power to modify the contract contained in the policies, but of Harnickell's right to refuse to receive them as completed contracts, save upon the condition imposed. He could not be compelled to accept, and had the right, uncontrolled by any limitations upon the agent's power, to receive the policies subject to the condition. That condition was evidenced by writing signed by both parties. Believing that the agent was acting in good faith, and with the knowledge of his principal, it would seem that Harnickell could scarcely have done more to protect himself from possible imposition.

The facts of that case and the character of the action distinguish it from the case at bar.

In Burke *v.* Dulaney, *supra*, the transaction of purchase and sale was evidenced by no writing other than the simple note given in payment of the agreed consideration; and the decision was, that, in such case it might be shown by parol evidence that the note was delivered upon a condition precedent. In Reynolds *v.* Robinson, 110 N. Y., 654, one of the cases cited above, it was held, in following the general doctrine of an earlier case, that the delivery of a contract for the sale of lumber might be shown to have been made upon condition. But the court said: "The rule should be
28 cautiously applied to avoid mistake or imposition, and confined strictly to cases within its reason."

The contracts and instruments involved in those cases are very different from the policies of insurance sued upon. These are elaborate instruments and bound in stipulations and conditions. Among these, note the following, that is embraced in the general clause recited in the preliminary statement: "*This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto.*"

This and other clauses limiting the powers of agents and requiring all additional terms and conditions to be indorsed in writing upon the policies, were devised by the insurance company, itself, to prevent questions concerning the conditions upon which its policies shall be "made and accepted" from being left to the vagueness and uncertainty of oral proof.

The general clause limiting the powers of agents to make new conditions, waivers, etc., was said, by the court of appeals of Maryland, in a case which does not decide the question here presented, to

refer "to those conditions and provisions of the policy which enter into and form a part of the contract of insurance and are essential to make it a binding contract between the parties; and which are properly designated as conditions." Franklin Fire Insurance Co. *v.* Chicago Ice Co., 36 Md., 102, 120.

It has also been held that, where the policy contained an acknowledgment, without qualification, or additional condition changing its effect, of the receipt of the premium, it was not competent to show by oral proof that the premium had not been paid, and that the policy, for that reason, had not taken effect. Basch *v.* Humboldt, etc., Insurance Co., 35 N. J. L., 429, 431; Consolidated Ice Co. *v.* Cashow, 41 Md., 59, 76.

The condition in this case was one in addition to those contained in the policies and upon which they were "made and accepted," and was not in writing indorsed upon them or executed simultaneously therewith.

Our conclusion is, that by reason of the nature and terms of the policies, it is not competent to show their delivery to the insured upon a verbal condition, making their existence as contracts depend upon the subsequent ratification of another agent.

In the absence of direct and controlling authority, we think this conclusion embodies the safer rule in such cases. It prevents the uncertainty and the opportunities for controversy and imposition that would naturally follow from making the binding effect of a completely executed and delivered policy depend upon verbal conditions of delivery. And any inconveniences or hardships that might follow the adoption of this view—beyond its enforcement in the particular case—can be readily and certainly avoided, either by the agent's indorsement of the condition on the policy, or else refusing to issue it at all before obtaining the consent of his principal.

It follows that the judgment must be reversed with costs, and the cause remanded with direction to enter judgment for the plaintiffs upon the stipulation of the agreed case. It is so ordered.

Reversed.

Mr. Chief Justice Alvey dissents.

29 TUESDAY, *June 12th, A. D.* 1900.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Appellants, *vs.* THE HARTFORD FIRE INSURANCE COMPANY.	No. 959. April Term, 1900.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said

supreme court, with direction to enter judgment for the plaintiffs upon the stipulation of the agreed case.

Per Mr. Justice SHEPARD.

June 12, 1900.

Dissenting, Mr. Chief Justice Alvey.

30 Court of Appeals of the District of Columbia, October Term, 1900.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Appellants,
vs.
THE HARTFORD FIRE INSURANCE COMPANY. } No. 959.

On consideration of appellee's motion for a rehearing in the above-entitled cause, it is by the court now here ordered that said motion be, and the same is hereby, granted.

Per Mr. Justice MORRIS.

October 19, 1900.

31 WEDNESDAY, *February 6th, A. D.* 1901.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Appellants,
vs.
THE HARTFORD FIRE INSURANCE COMPANY. } No. 959.

The above-entitled cause was reargued by Mr. Henry P. Blair, attorney for the appellants, and by Messrs. S. B. Paul and Alexander Wolf, attorneys for the appellee.

32 ALBERT A. WILSON ET AL., Trustees, Appellants,
vs.
THE HARTFORD FIRE INSURANCE COMPANY. } No. 959.

(Mr. Justice SHEPARD delivered the opinion of the court:)

This case has been reargued on motion granted because of the novelty and importance of the question upon which the decision had been made to turn and in the hope that some additional authority might be found that would aid in its solution. None such has been called to our attention or developed by our own research. The propositions of the argument, which have been carefully considered, are substantially the same, though elaborated, as those upon which the cause was originally submitted. Whilst confessing that the question is one of difficulty, we see no reason to change the conclusion formerly reached and think it unnecessary to add anything to the opinion then delivered. Readopting that opinion as expressing the views of the majority of the court, the order then made reversing the judgment and remanding the cause for entry of judgment on behalf of the plaintiffs will not be disturbed.

Mr. Chief Justice Alvey dissents.

33 ALBERT A. WILSON and JOHN B. LARNER, Trustees, Appellants,
vs.
THE HARTFORD FIRE INSURANCE COMPANY. } No. 959.

(*Dissenting Opinion by Mr. Chief Justice Alvey.*)

I am constrained to dissent from the majority opinion filed in this case. I cannot for a moment appreciate the reasoning upon which the judgment of the court below is reversed. I do not see that the plaintiffs, under the agreed state of facts, have the shadow of a ground for recovery on the policies of insurance upon which they have sued. A valid policy of insurance, like all other contracts, must be the result of concurring minds of the parties thereto. There must be an *aggregatio mentium*, or otherwise it is not binding.

The agreed statement of facts in this case would seem to put the question beyond all doubt that the policies were never in fact delivered to the plaintiffs or their agents as completed contracts. It is agreed that Barrett, the agent of the defendant, stated to Tyler & Rutherford, the brokers acting for the plaintiffs, that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal, but that he would issue policies amounting to $2,000, equally divided on the buildings and machinery, upon the condition that the same should be held by Tyler & Rutherford *and not delivered to their principals* until the decision of the defendant company on the acceptance of the risk was duly had, and should be subject to immediate cancellation by notice that said company rejected the risk. It is also agreed that on the 27th of April, 1895, Royce, the special agent of the defendant, known by Tyler & Rutherford to be the representative of the defendant company, having authority to inspect, confirm, or cancel risks for and in behalf of the company, went to the office of Tyler & Rutherford and informed them that the defendant company refused to carry the risk and ordered the cancellation of said policies, and on the same day the said Barrett, being on his way to the office of Tyler & Rutherford, met R. K. Tyler, a member of that firm, who had made the negotiation for the policies, had the same in his custody, and had exclusive charge of the matter, and announced to him that the company ordered their cancellation; to which
34 the said Tyler responded, "All right; send up and get them."

This was all before the fire occurred. That the policies were ineffectual, because they were incomplete contracts, was well understood and fully recognized by all the agents of both parties who participated in the transaction.

Under such circumstances, I do not see upon what principle the insurance company can be held responsible on the policies. There is no question of estoppel involved, for the plaintiffs never knew of the existence of the policies, and therefore were never under the supposition that they were protected by them until some time after the fire occurred, on the 17th of May, 1895. The policies came to the possession of an agent of the plaintiffs by what is admitted to be

a clear mistake on the part of an accounting clerk of Tyler an
Rutherford, the insurance brokers, and with no intention on th
part of Tyler and Rutherford to deliver over the policies to th
plaintiffs or their agents.

The law upon this subject is very clear, and may be found i
most of the books that treat of the contract of insurance. In May o
Insurance, sect. 56, the result of numerous cases cited by the autho
is stated to be that if there has been no payment of the premium (a
is the case in the present instance) and no delivery in fact of th
policy, the contract is, *prima facie*, incomplete, and he who claim
under it must show that *it was the intention of the parties* that
should be operative, notwithstanding these facts. The presumptio
of law is that the delivery of the policy and the payment of the pr
mium are dependent upon each other, but this presumption may b
rebutted by showing a waiver of the payment or such other facts a
go to show the *intention and understanding of both parties* that th
policy shall be valid as if delivered, notwithstanding the non-pay
ment of the premium, and an actual delivery obtained by misrepr
sentation is no delivery to give effect to the contract. The mer
manual possession of the policy is of little consequence, whether i
be in the hands of the insurers or the insured. Its possession by th
insured makes a *prima facie* case for him, subject to be met by proo
that it was *never delivered by the consent of the insurers*, whil
its possession by the insurers makes a *prima facie* case fo
them, subject to be met by proof that, though not transferre
it was intended by the parties to be a valid contract without furth
action by either, and so in legal contemplation there was a delivery
This principle is exemplified by a number of cases cited by th
author.

The question whether a contract has been delivered or accepted
not is always one of a preliminary character that arises in advanc
of questions as to the construction of the contract itself, and mo
generally it is one that depends upon parol evidence for its dete
mination. Therefore, whether an instrument sued upon, being eith
deed or simple contract, policy of insurance, or other written instr
ment, came into the hands of the plaintiff without *any absolute an
final delivery* by the party sought to be charged thereby, is a questio
upon which parol evidence is always admissible. 1 Greenl. Ev., se
284; Leppoc *vs.* National Bank of Md., 32 Md., 136, 144; Clark *v*
Gifford, 10 Wend., 320; U. S. *vs.* Leffler, 11 Pat., 86; Couch *v*
Meeker, 2 Conn., 302; McFarland *vs.* Sikes, 54 Conn., 250; Burk
vs. Dulaney, 153 U. S., 228. And where an instrument is signe
with an understanding that it is not to be delivered except upon th
performance of a certain condition or upon the happening of a ce
tain event or contingency, this may be shown by parol, in avoi
ance of the effect of the instrument. Black *vs.* Lamb, 1 Beasley
108; Burke *vs.* Dulaney, *supra*, and cases cited.

The contention that because the policy contains the provision tha
"this policy is made and accepted subject to the foregoing stipula
tions and conditions, together with such other provisions, agreement
or conditions as may be endorsed hereon or added thereto, and n

officer, agent, or other representative of the company shall have the power to waive any provision or condition of this policy except such," &c., therefore parol evidence is not admissible to show the circumstances under which the policies were written and placed in the hands of the insurance brokers, to be retained by them until further notice as to whether the risk was accepted, because, as contended, such evidence would vary or alter the terms and
36 conditions of the policy, cannot for a moment be supported. Such contention simply begs the whole question. It assumes that the risk had been accepted by the defendant company, and that the policies had been delivered to the plaintiffs or their agents as completed contracts. That is the very question in dispute. Until the policies were in fact issued and delivered as executed contracts the terms and conditions contained in them could have no operative effect whatever. This would seem to be well settled beyond question. Benton *vs.* Martin, 52 N. Y., 570, 574; Harnickell *vs.* N. Y. Life Ins. Co., 111 N. Y., 390; Brown *vs.* Am. Cent. Ins. Co., 70 Iowa, 390.

Without adding anything more, I am, for the reasons briefly stated, decidedly of opinion that the policies sued on never attached to the property, and that the court below was right in entering judgment for the defendant on the statement of agreed facts, and that that judgment ought to be affirmed.

37 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 36, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Albert A. Wilson and John B. Larner, trustees, appellants, *vs.* The Hartford Fire Insurance Company, No. 959, January term, 1901, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 20th day of March, A. D. 1901.

ROBERT WILLETT,

Clerk of the Court of Appeals of the District of Columbia

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Albert A. Wilson and John B. Larner, trustees, are appellants and The Hartford Fire Insurance Company is appellee, which suit was removed into the said Court of Appeals by virtue of an appeal

from the supreme court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United States,

39 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of April, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

40 [Endorsed:] File No., 18,110. Supreme Court of the United States. No. 625. October term, 1900. The Hartford Fire Insurance Co. *vs.* Albert A. Wilson and John B. Larner, trustees. Writ of certiorari. Court of Appeals, District of Columbia. Filed Apr. 20, 1901. Robert Willett, clerk.

41 In the Court of Appeals of the District of Columbia.

THE HARTFORD FIRE INSURANCE COMPANY, Petitioner, }
vs. } No. 959.
ALBERT A. WILSON and JOHN B. LARNER, Respondents. }

It is stipulated and agreed between the undersigned attorneys for the respective parties to the above-entitled cause that the certified copy of the transcript of record herein filed in the Supreme Court of the United States in the case of The Hartford Fire Insurance Company *vs.* Albert A. Wilson and John B. Larner, trustees, number 625, October term, 1900, may be taken and considered as the return of this court to the writ of certiorari issued by the Supreme Court of the United States, dated April 19, 1901, in the case above referred to.

SAMUEL B. PAUL,
ALEXANDER WOLF,
Attorneys for the Hartford Fire Insurance Company.
HENRY P. BLAIR,
Attorney for Albert A. Wilson and John B. Larner, Trustees.

42 Court of Appeals of the District of Columbia.

Return to Writ of Certiorari.

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of Albert A. Wilson and John B. Larner, trustees, appellants, *vs.* The

Hartford Fire Insurance Company is a full, true, and complete transcript of the record upon which said cause was heard in the Court of Appeals of the District of Columbia, together with all proceedings in said court.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 22d day of April, A. D. 1901.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

43 [Endorsed:] File No., 18,110. Supreme Court U. S., October term, 190–. Term No., 625. The Hartford Fire Insurance Co., petitioner, *vs.* Albert A. Wilson *et al.* Writ of certiorari and return. Filed April 23, 1901.

In Error 292 79
Brf. of Paul & Wolf for Petitioner
Office Supreme Court U.
FILED
APR 8 1901
JAMES H. MCKENNEY,
Clerk.
Filed Apr. 8, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 625

THE HARTFORD FIRE INSURANCE COMPANY,
PETITIONER,

vs.

ALBERT A. WILSON AND JOHN B. LARNER,
TRUSTEES, RESPONDENTS.

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

SAMUEL B. PAUL,
ALEXANDER WOLF,
Attorneys for Petitioner.

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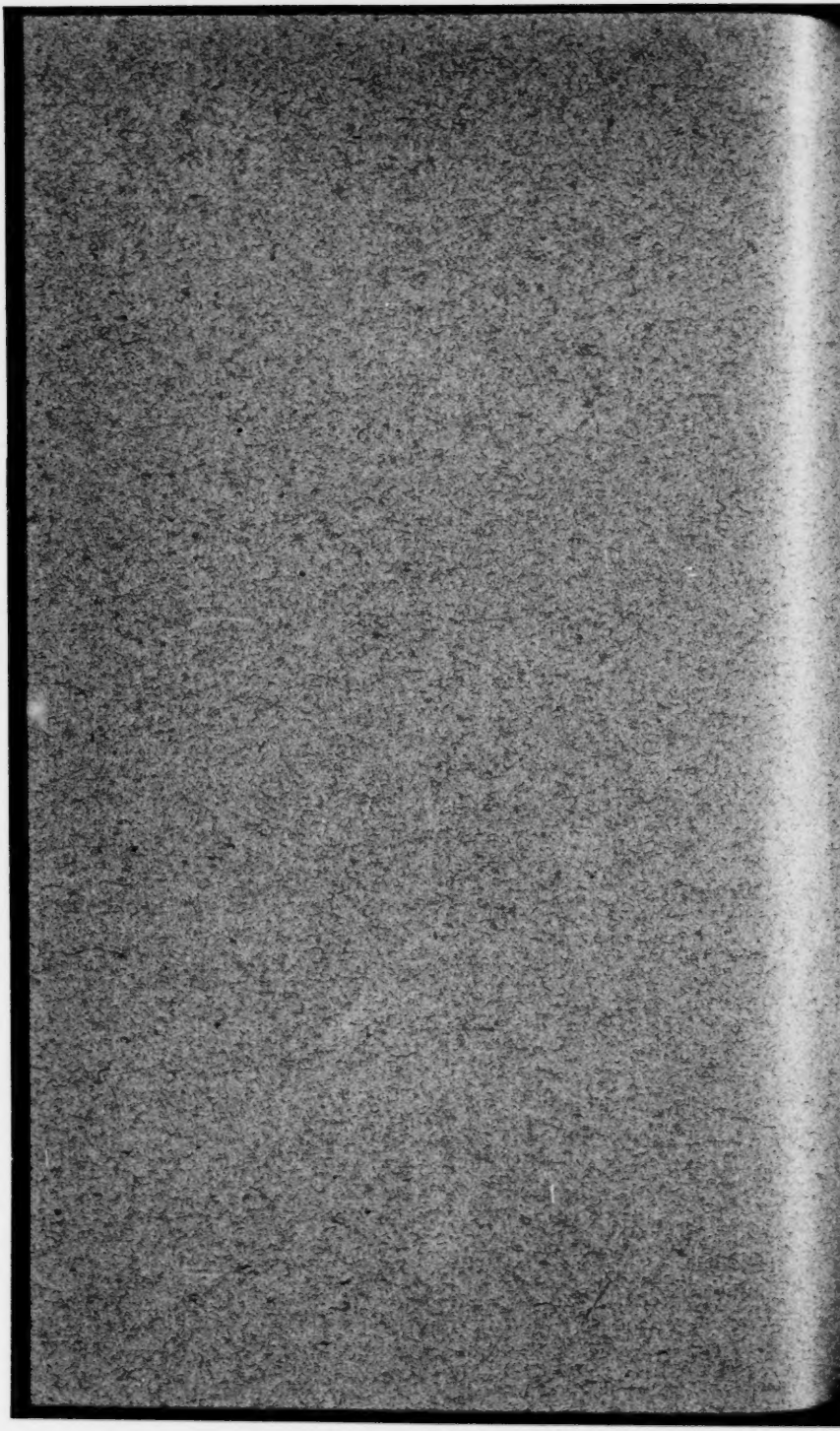

10084

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No.

THE HARTFORD FIRE INSURANCE COMPANY,
PETITIONER,

vs.

ALBERT A. WILSON AND JOHN B. LARNER,
TRUSTEES, RESPONDENTS.

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Now comes the Hartford Fire Insurance Company, the petitioner above named, and respectfully prays for a writ of certiorari to the Court of Appeals of the District of Columbia, requiring the above cause to be certified to this court for review and determination, and represents:

I.

That it is a fire insurance corporation duly incorporated under the laws of the State of Connecticut and doing business in the District of Columbia.

II.

That the respondents, Albert A. Wilson and John B. Larner, are citizens of the United States and residents of the District of Columbia.

III.

That heretofore, to wit, on November 12, 1895, your petitioner was made defendant in a suit at law in the Supreme Court of the District of Columbia, in which Albert A. Wilson and John B. Larner, as trustees, were the plaintiffs, said suit being for the alleged non-payment of certain insurance policies alleged to have been issued and delivered by your petitioner to said Wilson and Larner, trustees, as aforesaid; that to the said declaration your petitioner pleaded the general issue, and issue was joined thereon.

IV.

That thereafter, to wit, June 15, 1898, the parties hereto stipulated to submit the said cause upon the following agreed case:

1. Prior to April 17, 1895, C. C. Duncanson, treasurer of the Ivy City Brick Company of the city of Washington, D. C., authorized the firm of Tyler & Rutherford, of said city, at their request, to place insurance for the company, loss, if any, payable to Albert A. Wilson, et al, trustees under a deed of trust given by said company, as interest might appear, said Duncanson averring the amount to be placed to be the sum of ten thousand dollars ($10,000.00), and Tyler & Rutherford averring a much larger sum.

On said April 17, 1895, said Tyler & Rutherford, under the aforesaid authority, proposed to one Barrett, an agent, at said city of Washington, of the Hartford Fire Insurance Company, of Hartford, Connecticut, for insurance on properties of the said Ivy City Brick Company.

2. Said Barrett stated to said Tyler & Rutherford that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal, but that he would issue the
12 policies amounting to $2,000, equally divided on the baildings and machinery, upon the condition that the same should be held by the said

Tyler and Rutherford, and not delivered to their principals until the decision of the Hartford Fire Insurance Company on the acceptance of the risk was duly had, and should be subject to immediate cancellation (the five days' notice in the policy conditions being waived) by notice that said company rejected the risk.

3. This condition was accepted by said Tyler & Rutherford, and the two policies of insurance in the declaration set forth were thereupon written and and placed in their hands.

4. A short time thereafter, to wit, on the 27th day of April ensuing, on the first inspection visit to Washington after the issue of said policies, William R. Royce, the special agent of the Hartford Fire Insurance Company, known by said Tyler & Rutherford to be the representative of the company, having authority to inspect, confirm, or cancel risks for and in behalf of said company, went to the office of said Tyler & Rutherford and informed them that the Hartford Fire Insurance Company refused to carry the risk and ordered the cancellation of the said policies, and on the same day the said Barrett, being on his way to the office of Tyler & Rutherford, met R. K. Tyler, a member of that firm, who had made the negotiation for the policies, had the same in his custody, and had the exclusive charge of the matter, and announced to him that the company ordered their cancellation; to which the said Tyler responded, "All right; send up and get them."

5. The said Barrett sent three times to the office of Tyler & Rutherford for the policies, each time his employer was informed by one of the clerks
13 of Tyler & Rutherford that Mr. R. K. Tyler, who had charge of the policies, was absent from the office, and they would have to see him.

6. Said Barrett was taken sick and did not appear at his office for some days, but had immediately ordered the entry clerk to make the customary entry in such cases on the register where the policies were noted, "Cancelled by order of company," which was accordingly done.

7. On the first day of May ensuing, the customary

mutual accounts of business between the offices of said Barrett and said Tyler & Rutherford were settled, and the two policies were treated as dead, no charge for their premiums being presented on the one hand or asked for on the other.

(MEM.—Of the facts recited in the second clause of paragraph 1 and in paragraphs 2, 3, 4, 5, 6 and 7 above set forth, no party connected with or interested by mortgage or otherwise in the Ivy City Brick Company had any knowledge until after the fire occurred.)

8. The existence of the two policies was never reported to the said Duncanson nor to anyone connected with the Ivy City Brick Company by mortgage or otherwise, nor did he or they have any knowledge of or connection with said policies until they came into the hands of said Duncanson on May 16th, 1895, and at no time prior to the fire had any party connected with or interested by mortgage or otherwise in the Ivy City Brick Company any knowledge of the transaction between said Barrett and said Tyler & Rutherford hereinbefore set forth.

9. The two policies had been overlooked by Tyler & Rutherford and lay in the drawer along
14 with a number of other policies issued by other insurance companies which had been secured by said Tyler & Rutherford for the purpose of filling the above order. Of this fact no one connected with the Ivy City Brick Company in any interest whatever was informed until after the fire.

10. Tyler & Rutherford had found great difficulty in procuring the desired insurance, and aver that the entire amount proposed was never secured. Some of the agencies insisted on the same conditions as to cancelations as those fixed between said Barrett and said Tyler & Rutherford, and cancellations by orders of the different companies were so frequent that said Tyler & Rutherford could not at any time before May 16th know how much of binding insurance was in hand. Of all these facts the said R. K. Tyler avers that he informed the said Duncanson in the progress of the effort to secure insurance, and some time prior to the fire. The said Duncanson denies

that he had any information as to any of these facts at any time prior to the fire, except the fact that there was difficulty in procuring the desired insurance. No specific mention, however, of the two policies of the defendant was made to said Duncanson or any one connected in any interest with the Ivy City Brick Company.

11. On the 16th day of May, 1895, a clerk of Tyler & Rutherford was directed to make up the account of the policies on hand and put them in a package for delivery. The two policies of the Hartford Fire Insurance Company, which had been overlooked and were then lying in the same drawer
15 with the other policies, taken in fulfillment of this order, were included in the account and placed in the package with said other policies by said clerk of Tyler & Rutherford without the personal knowledge of said Tyler & Rutherford, and both were handed to said Duncanson by said R. K. Tyler, said Tyler not examining the same. Said Duncanson took the package and engaged to pay the account on the Monday week following, to wit, May 27, 1895.

12. On the morning of May 17th, after the fire, which occurred about one o'clock A. M. on that day, said R. K. Tyler came to said Duncanson and asked for the return of the two policies, stating that they had been handed him by mistake and the fact of their previous cancellation, said Tyler averring that he did not know that the property described as insured had been destroyed. Later, on that day, when the fact was known that the property described in the policies was destroyed, Tyler & Rutherford, by telephone, informed the Washington Loan & Trust Company, the beneficiary of the trust held by Wilson et al., trustees, that the Hartford policies had been delivered by mistake and requested it to send back the two policies, and were answered that they were locked up, but would be returned the next morning.

Of this request and answer by the telephone it is agreed that the Ivy City Brick Company knew nothing at the time, and when informed of said request directed that the policies be not returned. The policies were not returned and sundry corres-

pondence followed between said Tyler & Rutherford, said Duncanson, and the Washington Loan & Trust Company, in the course of which said Duncanson sent a check to Tyler & Rutherford for the settlement of the account above referred to. Tyler & Rutherford refused said settlement, stating that the two policies of the Hartford were void and had been sent in by mistake, and returned the check, with a corrected account, excluding these policies. The correspondence between said Duncanson, said Tyler & Rutherford and said Washington Loan & Trust Company and the policies sued on may be filed with this statement and considered as part of this agreed case.

13. Defendant waives any claim of laches or irregularity as to notice of loss, or as to the particular account commonly called proof of loss.

14. The parties hereto reserve the right to except to the rulings of the court on the aforesaid agreed case. The court shall be considered as having directed the jury to find a verdict in favor of the party for whom the court itself shall find in accordance with the stipulation following, and either party hereto shall be considered as having filed an objection to such ruling or rulings of the court and having duly taken exception thereto, the said party so excepting shall be allowed an appeal thereon to the Court of Appeals, and this agreed case shall be filed in the said court as the proper bill of exceptions herein.

On the above state of facts it is agreed that should the court find for the plaintiff judgment shall enter for $2,000, with interest from October 7, 1895, and costs.

And should the court find for the defendant, judgment shall enter for the defendant, with costs.

The correspondence and the policies sued on referred to in paragraph 15 of said agreed case, will be found on pages 10, 11, 12, 13 and 14 of the transcript of record, and pages 1, 2, 3, 4, 5 and 6 of the addition to record, both herewith submitted.

V.

That this action came on to be heard upon said agreed case before Mr. Justice Bradley holding the Supreme Court of the District of Columbia, who being of opinion that the plaintiffs were not entitled to recover, rendered judgment in favor of your petitioner. The opinion of Bradley, J., is attached hereto and prayed to be made part hereof.

VI.

That from the judgment of said court in favor of your petitioner an appeal was prosecuted to the Court of Appeals of the District of Columbia, which said court on the 12th day of June, A. D. 1900, by a majority opinion (Justices Morris and Shepard), Chief Justice Alvey dissenting, reversed the judgment of the Supreme Court of the District of Columbia, and held that the plaintiffs were entitled to recover upon said policies.

That the principles involved in the decision are of far greater importance than the amount of money. In effect the majority of the Court of Appeals proclaim that *the delivery* of a policy of insurance should be placed upon different rules of law from those governing the delivery of other instruments of contract.

That a motion for rehearing was granted and a rehearing had, which resulted in the adherence of the court to its original decision, Chief Justice Alvey dissenting as before. The opinion of the majority of the Court of Appeals through Shepard, A. J., and the dissenting opinion of Alvey, C. J. are attached hereto and prayed to be part hereof, and the briefs of counsel are filed herewith.

VII.

Your petitioner respectfully represents: That the controversy in this case arises from a conditional delivery of two policies of insurance under an agreement between Tyler &

Rutherford, agents of the respondents, and Barrett, an agent of your petitioner; the rejection in a reasonable time of the risk as provided in said agreement; the acceptance of said rejection by said Tyler & Rutherford, and their consent to the return of the policies; a settlement between the respective agents that no premium was due in the premises—*all long before the respondents ever knew or heard of the existence of the policies and whilst the right of Tyler & Rutherford to negotiate for insurance was in their full control*; the accidental retention of the policies in the hands of Tyler & Rutherford, and their coming by accident into the hands of the respondents a few hours before the fire; all of which is clearly and concisely set forth in the "Agreed Case."

For a *first assignment of error*, your petitioner cites from the opinion of the majority of the Court of Appeals the following:

> "Our conclusion is that by reason of the nature and terms of the policies, it is not competent to show their delivery to the insured upon a verbal condition; making their existence as contracts depend upon the subsequent ratification of another agent.'

This court, in the case of Burke *vs.* Dulaney, 153 U. S. 228, held:

> "The nominal delivery of an instrument may always be proved to be on a condition which has not been fulfilled in order to avoid its effect."

This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligations never commenced. Evidence of such an oral agreement would show that the contingency never happened and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations. The said Court of Appeals by a majority of the

court, in their opinion reversing the decision of the court below, admitted this to be the law, but they attempt to make this case an exception to the general rule on account of certain stipulations and conditions in the policies, thus putting the conditions of contracts in effect before they become contracts at all by final delivery. This is in direct violation of all authorities, the rule being that the provisions in an instrument relate to the instrument itself after it becomes a living and existing contract between the parties and only then. These policies were never in effect but awaited the performance of the condition precedent before any of the conditions or stipulations contained in them became operative. The majority of the Court of Appeals admit that they find no authorities to support their opinion. It rests upon the conclusion that policies of insurance do not come under the broad rule laid down in Burke *vs.* Dulaney, which covers the "*nominal delivery of an instrument*," ignoring or annulling the specific decisions of the Court of Appeals of New York in the important case of Hanickell *vs.* The New York Life Insurance Company, 111 N. Y. 399, and the New Jersey Court of Errors in Millville Mutual Insurance Company *vs.* Collard, 38 N. J. 480, both of which distinctly apply the rule to policies of insurance.

Justice Peckham, delivering the opinion in the Hannickell case, says:

> "*This, we think, was clearly a condition precedent* to the full delivery and acceptance *of these policies* issued by the defendant, *and until such condition precedent was complied with or waived, no fully executed and valid contract of insurance* existed between these parties.
>
> "No question of the right to *conditionally receive an instrument*, not under seal, by a party thereto can be successfully raised. Benton *vs.* Martin, 58 N. Y. 570, decides this proposition, and leaves it unnecessary for us to discuss the abstract question.
>
> "*The provisions in the policies themselves which are above quoted relate to the policies themselves after they should become executed instruments between these parties.*"

On examination of the record, herewith submitted, it will appear that Mr. Justice Bradley, of the Supreme Court of the District of Columbia, in his opinion, and Mr. Chief Justice Alvey, of the Court of Appeals, dissenting from the majority of the opinion of that court, agreed with your petitioner in holding that this condition precedent was a valid condition; that the policies went into the hands of the respondents upon mistake of fact, and were never delivered as present contracts unconditionally, and that the respondents were not entitled to recover.

Mr. Justice Alvey in his dissenting opinion on this question says:

> "The contention that because the policy contains the provision that 'this policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon, or added thereto, and no officer, agent or other representative of the company shall have the power to waive any provision or condition of this policy except such,' etc.; therefore parol evidence is not admissible to show the circumstances under which the policies were written and placed in the hands of the insurance brokers, to be retained by them until further notice as to whether the risk was accepted; because, as contended, such evidence would vary or alter the terms and conditions of the policy, can not for a moment be supported. Such contention simply begs the whole question. It assumes that the risk had been accepted by the defendant company, and that the policies had been delivered to the plaintiffs, or their agents, as completed contracts. That is the very question in dispute. Until the policies were in fact issued and delivered, as executed contracts, the terms and conditions contained in them could have no operative effect whatever. This would seem to be well settled beyond question.
>
> "The question whether a contract has been delivered or accepted or not is always one of a preliminary character, that arises in advance of questions as to the construction of the contract itself, and most generally it is one that depends upon parol evidence

> for its determination. Therefore, whether an instrument sued upon, being either deed or simple contract, policy of insurance, or other written instrument, came into the hands of the plaintiff without *any absolute and final delivery* by the party sought to be charged thereby is a question upon which parol evidence is always admissible. And where an instrument is signed with an understanding that it is not to be delivered except upon the performance of a certain condition, or upon the happening of a certain event or contingency, this may be shown by parol, in avoidance of the effect of the instrument."

In this case Tyler & Rutherford had, in effect, surrendered the policies to the petitioner, as will appear from paragraph 4 of the agreed case (page 2 of the Record herewith submitted), and the delivery to the respondents was due entirely to the mistake of a clerk of the said Tyler & Rutherford. Such delivery upon said mistake of fact could in no sense convey to the respondents any rights under said policies, nor could such delivery impose upon your petitioner any liabilities or obligations. It is a general rule of law that where an instrument is delivered upon mistake of fact, its delivery is annulled, and that no rights or obligations can accrue thereunder.

Your petitioner as a *Second assignment of error* by the majority of the Court of Appeals, insists that the court erred in rejecting the contention of your petitioner: That, *even if the policies were in force as a temporary protection to the respondent, they were dead by effective cancellation according to their distinct terms and conditions, and had been in effect abandoned to your petitioner long before they by accident went into the hands of the respondent.* In support of this contention your petitioner begs leave to refer to its brief before the Court of Appeals herewith filed and made a part of this petition.

Your petitioner begs leave further to invite the attention

of this court to conclusions of fact in the opinion of the court which are wholly irreconcilable with the facts set forth in the agreed statement as set out in the record. These errors appear in almost every paragraph of the opinion. One conspicuous instance, largely affecting the conclusion reached, is the following in section 4 of the opinion of the court:

> "From the terms of the agreed statement it appears: That the local agent of the insurer, who was possessed of signed policies and authorized to fill the blanks, deliver them, and bind his principal thereby, regarded the policies as in force, at least, until disapproved by the company, and therefore subject to the reserved power of cancellation notwithstanding the conditional delivery hereafter to be considered separately."

From the Agreed statement, paragraph 7, it appears:

> "On the first day of May ensuing, the customary mutual accounts of business between the offices of said Barrett and said Tyler & Rutherford were settled, and the two policies were treated as dead, no charge for their premiums being presented on the one hand or asked for on the other."

The sole basis of the suggestion that the agent regarded the policies as in force is what, with due respect, we think a very superficial view of the meaning of a phrase in the second paragraph of the agreed case.

A rule of interpretation is to give such meaning to a phrase if possible as will make it consistent with its surroundings and the concurrent acts of parties. And the only meaning consistent with the context and conduct of the parties possible to the phrase "and should be subject to immediate concellation (the five days' notice in the policy conditions being waived)," was, that it should be given up to be bodily destroyed, and that the text of the instrument should not affect this.

Had the agent of your petitioner or the agent of respondents regarded the policies as in force from the time they were lodged in the hands of Tyler & Rutherford to the time when the rejection of the risk was announced, *there would certainly have been pro rata premium due for the* temporary risk carried.

It distinctly appears in the record that neither party regarded such pro rata premium as due. This contemporaneous action by both parties completely negatives the suggestion that the policies were in force in the interim and settles the fact that neither of the negotiating parties thought them to have been in force.

It also shows that no consideration for any such supposed liability existed or was contemplated, and therefore no contract could have existed, because contract is not binding without consideration.

The statement by the court:

> "There is nothing in the agreed statement to warrant the conclusion that the brokers' agency or employment extended any further than the procurement of the policies,"

is not borne out by the agreed statement which clearly shows that the authority given to said Tyler & Rutherford was to procure insurance, and surely it was competent for them to make a binding arrangement for themselves by which they could bargain for insurance to take effect only if and when the insurance company approved.

The court also stated:

> "Merely permitting the policies to remain for a time and uncalled for, in the hands of the brokers, which is all that this record discloses, is perfectly consistent with the idea of the termination of their agency."

The record discloses that the policies went into the hands of Tyler & Rutherford and remained there with a distinct

agreement that no delivery was to be made to their principal until the risk was accepted by the company.

A further statement of the court:

> "With the receipt of the policy a new relation is created between the insured and the broker, namely, that of depositor and depositary; the possession of the broker becomes, in law, the possession of the insured and nothing more."

It is clearly shown from the agreed statement that there was no receipt of the policies as a concluded binding contract. The general trend of the court in its opinion epitomizing the agreed case may be observed by comparing paragraph nine (9) of the opinion with paragraph nine (9) of the agreed case and paragraph ten (10) of the opinion with paragraph eleven (11) of the agreed case.

Your petitioner therefore respectfully prays that the writ of certiorari may be issued to the Court of Appeals of the District of Columbia to bring this cause to this court for review and determination.

HARTFORD FIRE INSC. CO.,
[SEAL] By P. C. ROYCE, *Secy.*

SAMUEL B. PAUL,
ALEXANDER WOLF,
Counsel for Petitioner.

CITY OF HARTFORD, }
State of Conn. } ss:

I, P. C. Royce, sec'y, of the Hartford Fire Insurance Company, corporation, do solemnly swear that I have read the foregoing petition by me subscribed, that I know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

P. C. ROYCE, *Sec'y,*
Hartford Fire Insc. Co.

Subscribed and sworn to before me this 26th day of March, 1901.

E. E. MARVIN,
U. S. Commissioner.

[SEAL]

We hereby certify that we have examined the foregoing petition, and in our opinion it is well founded, and that the prayers of your petitioner should be granted.

SAM'L B. PAUL,
ALEXANDER WOLF,
Counsel for Petitioner.

Messrs. BLAIR & THOM,
Attorneys for Albert A. Wilson and John B. Larner, Trustees:

Please take notice that we shall, on Monday, April the 8th next, at the opening of the court, or as soon thereafter as counsel can be heard, submit a motion to the Supreme Court of the United States upon the petition here filed to remove the whole record and cause to said court.

SAMUEL B. PAUL,
ALEXANDER WOLF,
Attorneys for Petitioner.

APPENDIX.

The Full Text of the Opinion of Bradley, J., is as Follows:

THE COURT: This is an action upon two policies of insurance. The instruments sued on are simple contracts. The case has been submitted upon an agreed statement of facts, by which it appears that the local agent of the defendant company was applied to by the firm of Tyler & Rutherford, as agents of the Ivy City Brick Company, who received their authority from C. C. Duncanson, treasurer of that company, to procure insurance upon the buildings and machinery of the Ivy City Brick Company. Barrett, the agent of the defendant, when the application was made to him, stated that this was an extremely and unusually hazardous risk, and that he doubted his authority to accept the risk without first communicating with his principal, the defendant; but that he would issue a policy for $1,000 on the buildings, and another policy for the same amount on the machinery, and put them in the hands of Tyler & Rutherford, upon the condition that Tyler & Rutherford should hold them, and should not deliver them to their principal, until the defendant had been communicated with, and had had an opportunity to express its assent or dissent. The policies are in the ordinary form, with the names of all the officers lithographed upon them, and needed only to be countersigned by the local agent and issued to make them operative.

Tyler & Rutherford accepted these conditions, took the policies, and retained them from the 17th day of April, 1895, the day of their date. On the 27th day of the same month, a special agent of the company, having authority to act in the premises, being in the city, went to the office of Tyler & Rutherford, and informed them that his company would not carry the risk. On the same day the local agent, Barrett, saw Mr. Tyler on the street, and informed him that his company would not accept or carry the risk, and wanted

the policies canceled. Tyler replied to him, "All right; send up and get them." Barrett sent several times to Tyler's office; his messenger not finding Tyler in, was informed by a clerk that he could not deliver the policies unless Mr. Tyler were there personally to direct it.

On the 16th day of May, 1895, the policies were delivered, by mistake of a clerk, with other policies in the hands of Tyler & Rutherford to C. C. Duncanson, treasurer of the Ivy City Brick Machine Company. Duncanson had no prior knowledge of their existence or of the conditions under which Tyler & Rutherford held them. On the night of that same day, or on the morning of the 17th of May, a fire occurred; and on the 17th Duncanson was informed by Tyler & Rutherford by note (they being ignorant of the fact that a fire had occurred, the fire having occurred early that that morning) that these policies had been canceled and recalled; that they had been treated as dead; that they had been delivered by mistake and he was asked to return them. After that information Duncason sought to pay the premiums upon these policies, embodying the amount in a check to Tyler & Rutherford that covered the amount of the premiums upon all the policies that had been delivered to him. Tyler & Rutherford refused to accept that check, stating that the two Hartford policies were void and had been sent in by mistake. In a settlement of mutual accounts between Tyler & Rutherford and Barrett on the first day of May, 1895, the premiums upon these policies did not enter. No premium was demanded on the one side and no premium was paid on the other. The items were entirely omitted from the account and the policies were treated as dead.

In response to Tyler & Rutherford's request for the return of these policies, the were informed by the officers of the Washington Loan & Trust Company, the beneficiary under the deed of trust in which the plaintiffs are trustees, at first, that the policies would be returned, but subse-

quently, that the Ivy City Brick Machine Company declined to permit or authorize their return; and the trustees named in the deed of trust mentioned subsequently brought this action.

By the agreed statement of facts it is stipulated that, if the plaintiffs are entitled to recover at all upon these policies (no question being made as to the plaintiffs' right as against that of the Ivy City Brick Machine Company, it being the assured), judgment may be entered in favor of the plaintiffs for the full amount of the policies, with interest from October 7, 1895, and costs; but that if the plaintiffs are not entitled to recover, judgment shall be entered for the defendant with costs.

At the hearing, the argument was principally addressed to the question, whether the policies having been delivered to Tyler & Rutherford and having taken effect, they could be subsequently canceled by the act of the defendant, through its agent, with the consent of Tyler & Rutherford. It was contended for the plaintiffs that Tyler & Rutherford, being the agents of the assured only for the purpose of securing the policies, were not agents for any other purpose, and that they could not, by their consent to the cancelation of the policies, bind the assured. On the other hand, it was urged in behalf of the defendant that Tyler & Rutherford were not only the agents for the purpose of procuring the policies, but agents in a much broader sense, and that they were possessed of ample authority to consent to their cancelation. It was also contended that the policies never became binding contracts, because never delivered.

The question of delivery appears to be the primary and main question in the case; for unless these instruments were made effective by delivery, the other question of the power of the agents of the assured to bind their principal by consenting to their cancelation or revocation need not be considered. Delivery, actual or constructive, is essential to perfect the existence of a written contract. In the case of these policies, delivery in some form was necessary to

complete the contracts between the parties. A manual turning over of the instrument is not always essential. There may be a delivery in a legal sense without manual tradition; and there may be manual tradition under conditions precedent that prevent the act from becoming a delivery in a legal sense until the conditions are performed.

It appears by the agreed statement of facts, that these policies were put in the hands of Tyler & Rutherford upon the express condition that they should not be delivered to their principals, so as to make them operative and give them force and effect as contracts between the parties, until the defendant company had been communicated with, and had signified its assent; and that upon the signification of its dissent, the policies should be "canceled." While the word "canceled" is used, it is evident that the understanding of the agents of both parties was that without such assent the policies should be void, and should be surrendered to the agent of the defendant.

It seems to me that the question is without difficulty, that a delivery to Tyler & Rutherford, under these circumstances, although they were the agents of the assured, was not a delivery in law. The custody intrusted to them was a custody that was to cease upon notice to them that the company would not carry the risk; and upon the happening of that event, all right to possession in Tyler & Rutherford terminated, and it became their duty to surrender the policies to the defendant or its agent. The delivery to Duncanson conferred no right or title to or upon the Ivy City Brick Company, or the plaintiffs. In cases where negotiable instruments have been delivered to an immediate party, or his agent upon conditions precedent, it has been held by high authority that the title did not pass until the performance of the conditions.

Quebec Bank of Toronto *vs.* Hellman, 110 U. S. 178.
Belleville Bank *vs.* Borneman, 124 Ills. 205.
Merchants' Exchange Bank *vs.* Luckow, 37 Minn. 542.
Benton *vs.* Martin, 52 N. Y. 570.

In Quebec Bank *vs.* Hellman, the note in suit was an accommodation note made by the defendants to Bacon & Co., and by them manually delivered to the Merchants' National Bank at Cincinnati, the agent of the plaintiff, upon the condition that either the note or its proceeds should be credited upon a claim held by the plaintiff against Bacon & Co. This condition was not performed. It was held that "under such circumstances, without the performance of the condition, there is no delivery in the commercial sense and no title passes."

In Benton *vs.* Martin, a sight draft drawn by the defendant, and given by him to the plaintiff, was lost before presentment. Subsequently, and before the maturity of the original, on application of the plaintiff, defendant executed another, an exact copy of the first, with the word "duplicate" written across it. He delivered this to the plaintiff upon the condition that he would not be responsible for any back laches, and that the new draft was simply to take the place of the original. This duplicate was retained one day at the request of defendant, and was then forwarded and presented for payment, and payment was refused, the drawees having failed the previous day. At all times, up to the time of the failure, defendant had funds to meet the draft in the hands of the drawees. Action was brought upon the duplicate, and the trial court directed a verdict for the defendant because of back laches. The Court of Appeals held that "instruments not under seal may be delivered to the one to whom on their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity, and the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument

may be limited by the conditions with which the delivery is made."

The same principle has been applied to the delivery of policies of insurance.

Where policies of life insurance had been manually delivered to the assured, and he had delivered to the agent of the insurance company securities representing the amount of the premium, but subject to certain conditions to be performed by the agent which were not performed, the assured was allowed to recover the securities in an action, it being held that the conditions were precedent to the full delivery and acceptance by him and the taking effect of the contract.

Hainickell *vs.* N. J. Life Ins. Co., 111 N. Y. 390.

Where an agent made out a policy of fire insurance and placed it in the hands of a third party until it could be ascertained whether the insurance company would accept the risk, and the company refused it, it was held, that there was no delivery, although the agent had previously received the premium.

Brown *vs.* American Cent. Ins. Co., 70 Iowa, 390.

Under the agreed statement of facts, I am of opinion that these policies never took effect, and that, therefore, the plaintiffs are not entitled to recover. Judgment must be entered up for the defendant, with costs.

Opinion of the Majority of the Court of Appeals.

Mr. Justice Shepard delivered the opinion of the Court:

This suit was brought by Albert A. Wilson and John B. Larner, trustees, upon two policies of insurance covering $1,000 on certain buildings and $1,000 on machinery of the Ivy City Brick Company for one year from April 17,

1895. Both policies were made payable to said trustees as their interest may appear.

The policies are simple contracts of the standard form, two of the stipulations of which, only, are of any importance in the determination of the case. These are: (1) "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancelation. (2) This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have the power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

An agreed statement was made of the facts that each party could prove, and with a reservation of the right of exception to all rulings of the court made thereon, the case was thereon submitted, and judgment was entered for the defendant.

2. From the agreed statement it appears:

(1) That Tyler & Rutherford, insurance brokers, were requested by the Ivy City Brick Company to obtain insurance upon its property for the sum of $10,000; and that they applied to Barrett, the local agent of defendant at Washington, for policies covering $2,000 of the risk.

(2) Said Barret stated to said Tyler & Rutherford that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal,

but that he would issue policies amounting to $2,000, equally divided on the buildings and machinery, upon the condition that the same should be held by the said Tyler & Rutherford, and not delivered to their principals until the decision of the Hartford Fire Insurance Company on the acceptance of the risk was duly had, and should be subject to immediate cancelation (the 5-days' notice in the policy conditions being waived) by notice that said company rejected the risk.

(3) This condition was accepted by said Tyler & Rutherford, and the two policies of insurance in the declaration set forth were thereupon written and placed in their hands.

(4) On April 27, 1895—ten days after the delivery of the policies aforesaid—defendant's special agent came to Washington and informed Tyler & Rutherford that defendant "refused to carry the risk and ordered the cancelation of said policies." On the same day Barrett met Tyler—who had negotiated the insurance and had the policies—and notified him that the defendant ordered their cancelation. Tyler responded: "All right; send up and get them."

(5) Barrett sent three times to Tyler & Rutherford for the policies but did not obtain them, because, as his messenger was informed, Tyler, who had charge of the policies, was absent and would have to be seen.

(6) Barrett became ill and did not appear at his office for some days; but he had immediately ordered his entry clerk to note on the register of these policies: "Canceled by order of company." And this was done, but the date does not appear.

(7) On May 1, according to custom, accounts between Barrett and Tyler & Rutherford were settled, but no charge for premiums was presented or made; the policies being treated as dead.

(8) The existence of the policies was not made known to the insured or anyone interested therefor until May 16, 1895, when it became possessed of them. Nor had the insured any knowledge of the transactions between Barrett and Tyler & Rutherford.

(9) The policies, until May 16, 1895, remained in the office of Tyler & Rutherford along with some other policies that had been obtained under the original order.

(10) On May 16, 1895, a clerk of Tyler & Rutherford was ordered by them to make up the account for premiums due on the policies obtained for the Brick Company and put them in a package for delivery. The package, including the policies sued on, was handed, with the account, to Tyler by the representative of the Brick Company; but Tyler did not examine the package and did not know that the policies were inclosed.

(11) The account included the premium charges for the two policies. The Brick Company's representative received the package and engaged to pay the account on May 27, 1895.

(12) On May 17, 1895, the property was destroyed by fire. On the same day, and after the fire, Tyler, averring that he did not know the property had been destroyed, demanded the return of the two policies of the party to whom he had delivered them, stating that they had been canceled and that he had delivered them by mistake. Later, on the same day, Tyler & Rutherford gave the same notice and made the same demand of the representative of the beneficiaries of the trust.

(13) The Brick Company directed the holding of the policies; and sent a check to Tyler & Rutherford for the amount of the account rendered, including the premiums on these two policies. They refused to receive the money for the premiums on these policies, declaring that they were void and had been delivered by mistake, and made up and transmitted a new account for premiums due, omitting these.

3. No question has been raised as regards the fact that no payments of the premiums of the policies had been received by the defendant; it being conceded that the customary credit and settling arrangements between the respective

parties and their agents and brokers were equivalent to payments, under the conditions of the policies, in so far as they may depend thereupon for their validity.

4. The first question raised on the argument relates to the scope of the agency of Tyler & Rutherford for the insured.

That they were agents authorized, by virtue of their employment, to represent the insured in all matters relating to the negotiation of the contracts, and to bind it by their representations and statements until, at least, the agency might be terminated by the final delivery of the executed policies, can not be denied. The particular extent and legal effect of this agency became material, only, in considering the branch of the defense founded on that part of the agreed statement respecting the cancelation of the policies—treating cancelation, as therein used, as the act of terminating or rescinding contracts actually in force until canceled.

From the terms of the agreed statement, it appeals that the local agent of the insurer, who was possessed of signed policies and authorized to fill the blanks, deliver them, and bind his principal thereby, regarded the policies as in force, at least, until disapproved by the company, and therefore subject to the reserved power of cancelation, nothwithstanding the conditional delivery, hereafter to be considered separately.

As regards the oral waiver of the five days' notice of cancelation, exacted of the brokers at the time of their delivery, it is not necessary to consider the effect of the express condition, in each policy, that additional stipulations, or waivers of those contained, in order to bind, shall be indorsed thereon, because the notice of cancelation, if effective as such, was in fact given more than five days before the loss occurred. The notice of cancelation was given to the brokers, and demand made of them for the return of the policies. None was given to the insured, and it had no knowledge of the fact from any source whatever.

There is nothing in the agreed statement to warrant the conclusion that the brokers' agency or employment extended any farther than the procurement of the policies. When executed and delivered—assuming for present purposes that the delivery was unconditional and complete—their agency and employment ended. Notice to them of cancelation was not the notice stipulated for in the policies, and was, therefore, ineffectual. Grace *vs.* American Central Ins. Co., 109 U. S. 278, 282.

In that case, it is true that the policy had passed into the actual possession of the insured before the notice of cancelation was given to the broker, who accepted the notice and promised the surrender of the policy; but we can not agree that this fact authorizes any limitation of the broad rule of the decision. It would be inconsistent with the general principles of the law of agency, applied in that decision, to hold, that because a policy is suffered to remain in the hands of the agent for its procurement, he thereby becomes the general agent of the insured—for that would be the necessary effect—with power to alter, to rescind, and to accept notice of cancelation and bind the insured without his knowledge or consent. To give such effect to the mere possession of the policy, after execution and delivery, would be, not only to revive a limited agency, for no reasonable purpose, but also to extend it and invest it with powers that had not previously been given. Moreover, it would be fraught with great danger to the vast interests dependent upon insurance, without any general, compensating benefit to any other interest.

Merely permitting the policies to remain for a time and uncalled for in the hands of the brokers, which is all that this record discloses, is perfectly consistent with the idea of of the termination of their agency.

With the receipt of the policy a new relation is created between the insured and the broker, namely, that of depositor and depositary; the possession of the broker becomes,

in law, the possession of the insured and nothing more; his sole duty and authority in the new relation is to deliver the policy upon demand of the insured or within a reasonable time without demand.

This brings us to the last ground of defense, the one chiefly relied on by the appellant, and upon which the decision was made to turn in the court below. The proposition—probably stated more broadly than is justified by the recitals of the agreed statement—is that the policies were not intended to take effect or become binding as completed contracts because of the express condition of their delivery to the brokers.

Now, it is quite clear that the brokers can not be regarded in any conceivable legal sense, as the agents of the insurer in this matter of delivery, and it is fair to add, there has been no such contention. On the other hand, upon principles hereinabove stated, the brokers are to be considered as the agents of the insured for all purposes connected with the negotiation and final delivery of the executed policies; and the question will, therefore, be considered as if the conditional delivery had been made direcely to the insured without their intervention.

The research of counsel has not produced a reported case in which the question of a conditional delivery of a policy of insurance, as here presented, has been determined. The case of Insurance Co. *vs.* Webster, 6 Wall. 129, cited on behalf of the appellant, can not be regarded as controlling. There, the policy was accepted from an agent in Michigan, upon a condition in writing, executed by the insured, that it should not take effect until approved by the general agent at Buffalo, New York. The premium had been paid at the time of delivery. The general agent disapproved the risk and ordered the issuing agent to return the premium and *cancel* the policy. This he failed to do, whilst engaged in an attempt to have the policy finally approved. Whilst this was going on the loss occurred. The premium was then

tendered to the insured, with notice that his application had been rejected. The court said that, from all the facts and circumstances in evidence, in connection with the authority and conduct of the two agents, it was apparent that, notwithstanding the strict letter of the executed condition of receipt, the policy was not intended to be a nullity pending the matter of its approval. Hence, as there was no notice to the insured and no tender of return of premium until after the loss, the policy was declared enforceable. In the case at bar, the premium, if charged at all to the brokers, was charged off, the risk was rejected within an apparently reasonable time, and notice was given to them while they held the policy under the condition, if that condition be available at all.

Nor are the decisions cited on behalf of the appellee any more controlling. These are: Quebec Bank, etc., *vs.* Hellman, 110 U. S. 178; Belleville Bank *vs.* Borneman, 124 Ill. 205; Merchants Ex. Bank *vs.* Luckoway, 37 Minn. 542; Benton *vs.* Martin, 52 N. Y. 570; Reynolds *vs.* Robinson, 110 N. Y. 654; Brown *vs.* American Central Ins. Co., 70 Iowa, 390; Hanickell *vs.* N. Y. Life Ins. Co., 111 N. Y. 390.

The first five of the foregoing cases need not be reviewed, for the doctrine enounced in each, so far as they bear upon the question to be decided, is to be found in a recent decision of the Supreme Court of the United States, the opinion in which reviews some of them. Burke *vs.* Dulaney, 153 U. S. 228. In that case suit was brought by the payee of a negotiable promissory note, in the usual form, against the maker. Evidence was held admissible to show that the note was delivered upon a distinct verbal agreement that it should not become operative as a note until the maker could examine the property for which it was given, and determine whether he would conclude the purchase. There was no other writing relating to the contract of purchase. The evidence did not tend, it was said, to contradict or vary a written contract, but to show that it never went into effect,

never in fact became the contract of the parties, because the condition upon which it was to become operative had not transpired.

In Brown *vs.* American Ins. Co., *supra*, the policy was not delivered to the insured, but was deposited with a third person to hold until notified of acceptance by the company. His possession was in law that of the company. Had that course been pursued in this case, there would be little difficulty.

In Hanickell *vs.* N. Y. Life Ins. Co., *supra*, the facts are peculiar.

The defendant's agent entered into negotiations with Hanickell, who was then heavily insured in other companies. He agreed to take two large policies in the New York Life, provided the agent would give certain credits upon the first premium, and procure a settlement or surrender of his existing policies, upon terms satisfactory to Hanickell. Pending the negotiations for this surrender, the agent brought the new policies to Hanickell with the notes for him to execute. The agent had no power to amend or add any condition to the policies.

Hanickell agreed to deliver his notes and to receive the policies, upon the express condition that the agent was to complete the performance of the agreement respecting the policies in the other companies.

The terms of this condition were fully expressed in writing signed by both Hanickell and the agent; but the fact was not communicated by the agent to the company. The agent failed to complete the arrangement of the old policies and declined to do so. Hanickell then returned the policies and demanded the return of his notes.

This being refused, he brought his action to compel the surrender of his notes and was awarded the relief prayed for. The court said the question was not in respect of the agent's power to modify the contract contained in the policies, but of Hanickell's right to refuse to receive them as

completed contracts, save upon the condition imposed. He could not be compelled to accept and had the right, uncontrolled by any limitations upon the agent's power, to receive the policies subject to the condition. That condition was evidenced by writing signed by both parties. Believing that the agent was acting in good faith and with the knowledge of his principal it would seem that Hanickell could scarcely have done more to protect himself from possible imposition.

The facts of that case and the character of the action distinguish it from the case at bar.

In Burke *vs.* Dulaney, *supra*, the transaction of purchase and sale was evidenced by no writing other than the simple note given in payment of the agreed consideration; and the decision was that in such case it might be shown by parol evidence that the note was delivered upon a condition precedent. In Reynolds *vs.* Robinson, 110 N. Y. 654, one of the cases cited above, it was held, in following the general doctrine of an earlier case, that the delivery of a contract for the sale of lumber might be shown to have been made upon condition. But the court said: "The rule should be cautiously applied to avoid mistake or imposition, and confined strictly to cases within its reason."

The contracts and instruments involved in those cases are very different from the policies of insurance sued upon. These are elaborate instruments and bound in stipulations and conditions. Among these, note the following, that is embraced in the general clause recited in the preliminary statement: "*This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto.*"

This and other clauses limiting the powers of agents and requiring all additional terms and conditions to be indorsed in writing upon the policies, were devised by the Insurance Company, itself, to prevent questions concerning the condi-

tions upon which its policies shall be "made and accepted" from being left to the vagueness and uncertainty of oral proof.

The general clause limiting the powers of agents to make new conditions, waivers, etc., was said by the Court of Appeals of Maryland, in a case which does not decide the question here presented, to refer "to those conditions and provisions of the policy which enter into and form a part of the contract of insurance and are essential to make it a binding contract between the parties; and which are properly designated as conditions" Franklin Fire Insurance Co. *vs.* Chicago Ice Co., 36 Md. 102, 120.

It has also been held that, where the policy contained an acknowledgment, without qualification, or additional condition changing its effect, of the receipt of the premium, it was not competent to show by oral proof that the premium had not been paid, and that the policy, for that reason, had not taken effect. Basch *vs.* Humboldt, etc., Insurance Co., 35 N. J. L. 429, 431; Consolidated Ice Co. *vs.* Cashow, 41 Md. 59, 76.

The condition in this case was one in addition to those contained in the policies and upon which they were "made and accepted," and was not in writing indorsed upon them or executed simultaneously therewith.

Our conclusion is, that by reason of the nature and terms of the policies, it is not competent to show their delivery to the insured upon a verbal condition, making their existence as contracts depend upon the subsequent ratification of another agent.

In the absence of direct and controlling authority, we think this conclusion embodies the safer rule in such cases. It prevents the uncertainty and the opportunities for controversy and imposition that would naturally follow from making the binding effect of a completely executed and delivered policy depend upon verbal conditions of delivery. And any inconveniences or hardships that might follow the

adoption of this view—beyond its enforcement in the particular case—can be readily and certainly avoided, either by the agent's indorsement of the condition on the policy, or else refusing to issue it at all before obtaining the consent of his principal.

It follows that the judgment must be reversed with costs, and the cause remanded with direction to enter judgment for the plaintiffs upon the stipulation of the agreed case. It is so ordered. Reversed.

Chief Justice Alvey dissents.

Opinion of the Majority of the Court of Appeals.

This case has been re-argued on motion granted because of the novelty and importance of the question upon which the decision had been made to turn, and in the hope that some additional authority might be found that would aid in its solution. None such has been called to our attention or developed by our own research. The propositions of the argument, which have been carefully considered, are substantially the same, though elaborated, as those upon which the cause was originally submitted. Whilst confessing that the question is one of difficulty, we see no reason to change the conclusion formerly reached, and think it unnecessary to add anything to the opinion then delivered. Readopting that opinion as expressing the views of the majority of the court, the order then made reversing the judgment and remanding the cause for entry of judgment on behalf of the plaintiffs, will be renewed.

Chief Justice Alvey dissents.

Dissenting Opinion of Chief Justice Alvey, of the Court of Appeals.

I am constrained to dissent from the majority opinion filed in this case. I can not for a moment appreciate the

reasoning upon which the judgment of the court below is reversed. I do not see that the plaintiffs, under the agreed state of facts, have the shadow of a ground for recovery on the policy of insurance upon which they have sued. A valid policy of insurance, like all other contracts, must be the result of concurring minds of the parties thereto; there must be an *aggregatic mentium*, or otherwise it is not binding.

The agreed statement of facts in this case would seem to put the question beyond all doubt, that the policies were never in fact delivered to the plaintiffs, or their agents, as completed contracts. It is agreed that Barrett, the agent of defendant, stated to Tyler & Rutherford, the brokers acting for the plaintiffs, that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal, but that he would issue policies amounting to $2,000 equally divided on the buildings and machinery, upon the condition that the same should be held by Tyler & Rutherford, *and not delivered to their principals*, until the decision of the defendant company on the acceptance of the risk was duly had, and should be subject to immediate cancelation by notice that said company rejected the risk. It is also agreed that on the 27th day of April, 1895, Royce, the special agent of the defendant, known by Tyler & Rutherford to be the representative of the defendant company, having authority to inspect, confirm, or cancel risks for and in behalf of the company, went to the office of Tyler & Rutherford and informed them that the defendant company refused to carry the risk and ordered the cancelation of said policies; and on the same day the said Barrett, being on his way to the office of Tyler & Rutherford, met R. K. Tyler, a member of that firm, who had made the negotiation for the policies, had the same in his custody, and had exclusive charge of the matter, and announced to him that the company ordered their cancelation; to which the said Tyler responded, "All right; send up and get them." This was

all before the fire occurred. That the policies were ineffectural because they were incomplete contracts, was well understood and fully recognized by all the agents of both parties, who participated in the transaction.

Under such circumstances, I do not see upon what principle the insurance company can be held responsible on the policies. There is no question of estoppel involved, for the plaintiffs never knew of the existence of the policies, and therefore were never under the supposition that they were protected by them, until some time after the fire occurred on the 17th day of May, 1895. The policies came to the possession of an agent of the plaintiffs by what is admitted to be a clear mistake on the part of an accounting clerk of Tyler & Rutherford, the insurance brokers, and with no intention on the part of Tyler & Rutherford to deliver over the policies to the plaintiffs or their agents.

The law upon this subject is very clear, and may be found in most of the books that treat of the contract of insurance. In May on Insurance, Sec. 56, the result of numerous cases cited by the author is stated to be, that if there has been no payment of the premium (as in the present instance), and no delivery in fact of the policy, the contract is, *prima facie*, incomplete, and he who claims under it must show that *it was the intention of the parties* that it should be operative notwithstanding these facts. The presumption of law is, that the delivery of the policy and the payment of the premium are dependent upon each other. But this presumption may be rebutted by showing a waiver of the payment, or such other facts as go to show the *intention and understanding of both parties* that the policy shall be valid as if delivered, notwithstanding the non-payment of the premium. And an actual delivery obtained by misrepresentation, is no delivery to give effect to the contract. The mere manual possession of the policy is of little consequence, whether it be in the hands of the insurers or the insured. Its possession by the insured makes a *prima facie*

case for him, subject to be met by proof that it was *never delivered by the consent of the insurers*; while its possession by the insurers makes a *prima facie* case for them, subject to be met by proof that, though not transferred, it was intended by the parties to be a valid contract, without further action by either, and so in legal contemplation there was a delivery. This principle is exemplified by a number of cases cited by the author.

The question whether a contract has been delivered or accepted or not is always one of a preliminary character, that arises in advance of questions as to the construction of the contract itself, and most generally it is one that depends upon parol evidence for its determination. Therefore, whether an instrument sued upon, being either deed or simple contract, policy of insurance, or other written instrument, came into the hands of the plaintiff without *any absolute and final delivery* by the party sought to be charged thereby, is a question upon which parol evidence is always admissible. 1 Greenl. Ev. Sec. 284; Leppoc *vs.* National Bank of Md., 32 Md. 136, 144; Clark *vs.* Gifford, 10 Wend. 320; U. S. *vs.* Leffler, 11 Pat. 86; Couch *vs.* Mecker, 2 Conn. 302; McFarland *vs.* Sikes, 54 Conn. 250; Burke *vs.* Dulaney, 153 U. S. 228. And where an instrument is signed with an understanding that it is not to be delivered except upon the performance of a certain condition, or upon the happening of a certain event or contingency, this may be shown by parol, in avoidance of the effect of the instrument. Black *vs.* Lamb, 1 Beasley, 108; Burke *vs.* Dulaney, *supra*, and cases cited.

The contention that because the policy contains the provision that "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon, or added thereto, and no officer, agent, or other representative of the company shall have the power to waive any provision or condition of this policy except

such," etc.; therefore parol evidence is not admissible to show the circumstances under which the policies were written and placed in the hands of the insurance brokers, to be retained by them until further notice as to whether the risk was accepted; because, as contended, such evidence would vary or alter the terms and conditions of the policy, can not for a moment be supported. Such contention simply begs the whole question. It assumes that the risk has been accepted by the defendant company, and that the policies had been delivered to the plaintiffs, or their agents, as completed contracts. That is the very question in dispute. Until the policies were in fact issued and delivered, as executed contracts, the terms and conditions contained in them could have no operative effect whatever. This would seem to be well settled beyond question. Benton *vs.* Martin, 52 N. Y. 570, 574; Hanickell *vs.* N. J. Life Ins. Co., 111 N. Y. 390; Brown *vs.* Am. Cent. Ins. Co. 70 Iowa, 390.

Without adding anything more, I am, for the reasons briefly stated, decidedly of opinion that the policies sued on never attached to the property, and that the court below was right in entering judgment for the defendant on the statement of agreed facts, and that that judgment ought to be affirmed.

Supp. 19
No. 625. 625
Supreme Court
FILED
APR 8 1901
JAMES H. McKENNEY,
Clerk
Supp. to Brf. of Paul & Wolf for Pet

IN THE

Court of Appeals of the District of Columbia

OCTOBER TERM, 1900.

Filed April 8, 1901.

No. 959.

ALBERT A. WILSON AND JOHN B. LARNER,
Trustees, Appellants,

vs.

THE HARTFORD FIRE INSURANCE COMPANY,
Appellee.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLEE.

SAM'L B. PAUL,
Of Counsel.

ALEXANDER WOLF,
MAURICE D. ROSENBERG,
Attorneys for Defendant.

IN THE

Court of Appeals of the District of Columbia

OCTOBER TERM, 1900.

No. 959.

ALBERT A. WILSON AND JOHN B. LARNER,
TRUSTEES, PLAINTIFFS AND APPELLANTS,
vs.
THE HARTFORD FIRE INSURANCE COMPANY,
DEFENDANT AND RESPONDENT.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

The facts all appear in the Agreed Case (pp. 6-9 inclusive, of the printed Transcript of the Record), which we give in full:

Agreed Case.

Filed June 15, 1898.

In the Supreme Court of the District of Columbia.

ALBERT A. WILSON ET AL., Plaintiffs, *vs.* THE HARTFORD FIRE INSURANCE COMPANY of the City of Hartford, Connecticut, Defendant.	At Law. No. 38932.

1. Prior to April 17th, 1895, C. C. Duncanson, treasurer of the Ivy City Brick Company of the City of Washington, D. C., authorized the firm of Tyler & Rutherford, of said

city, at their request, to place insurance for the company, loss, if any, payable to Albert A. Wilson *et al.*, trustees under a deed of trust given by said company, as interest might appear, said Duncanson averring the amount to be placed to be the sum of ten thousand dollars ($10,000), and Tyler & Rutherford averring a much larger sum.

On said April 17th, 1895, said Tyler & Rutherford, under the aforesaid authority, proposed to one Barrett, an agent, at said City of Washington, of the Hartford Fire Insurance Company of Hartford, Connecticut, for insurance on properties of the said Ivy City Brick Company.

2. Said Barrett stated to said Tyler & Rutherford that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his prin-
12 cipal, but that he would issue policies amounting to $2,000, equally divided on the buildings and machinery, upon the condition that the same should be held by the said Tyler & Rutherford, and not delivered to their principals until the decision of the Hartford Fire Insurance Company on the acceptance of the risk was duly had, and should be subject to immediate cancellation (the 5-days' notice in the policy conditions being waived) by notice that said company rejected the risk.

3. This condition was accepted by said Tyler & Rutherford, and the two policies of insurance in the declaration set forth were thereupon written and placed in their hands.

4. A short time thereafter, to wit, on the 27th day of April ensuing, on the first inspection visit to Washington after the issue of said policies, William R. Royce, the special agent of the Hartford Fire Insurance Company, known by said Tyler & Rutherford to be the representative of the company, having authority to inspect, confirm, or cancel risks for and in behalf of said company, went to the office of said Tyler & Rutherford and informed them that the Hartford Fire Insurance Company refused to carry the risk and ordered the cancellation of the said policies, and on the same day the said Barrett, being on his way to the office of Tyler & Rutherford, met R. K. Tyler, a member of that firm, who had made the negotiation for the policies, had the same

in his custody, and had exclusive charge of the matter, and announced to him that the company ordered their cancellation; to which the said Tyler responded, "All right; send up and get them."

5. The said Barrett sent three times to the office of Tyler & Rutherford for the policies. Each time his employee was informed by one of the clerks of Tyler & Ruther-
13 ford that Mr. R. K. Tyler, who had charge of the policies, was absent from the office, and they would have to see him.

6. Said Barrett was taken sick and did not appear at his office for some days, but had immediately ordered the entry clerk to make the customary entry in such cases on the register where the policies were noted, "Cancelled by order of company," which was accordingly done.

7. On the first day of May ensuing the customary mutual accounts of business between the offices of said Barrett and said Tyler & Rutherford were settled, and the two policies were treated as dead, no charge for their premiums being presented on the one hand or asked for on the other.

(MEM.—Of the facts recited in the second clause of paragraph 1 and in paragraphs 2, 3, 4, 5, 6, and 7 above set forth, no party connected with or interested by mortgage or otherwise in the Ivy City Brick Company had any knowledge until after the fire occurred.)

8. The existence of the two policies was never reported to the said Duncanson nor to any one connected with said Ivy City Brick Company by mortgage or otherwise, nor did he or they have any knowledge of or connection with said policies until they came into the hands of said Duncanson on May 16th, 1895, and at no time prior to the fire had any party connected with or interested, by mortgage or otherwise, in the Ivy City Brick Company any knowledge of the transaction between said Barrett and said Tyler & Rutherford hereinbefore set forth.

9. The two policies had been overlooked by Tyler
14 & Rutherford and lay in the drawer along with a number of other policies issued by other insurance companies which had been secured by said Tyler & Ruth-

erford for the purpose of filling the above order. Of this fact no one connected with the Ivy City Brick Company in any interest whatever was informed until after the fire.

10. Tyler & Rutherford had found great difficulty in procuring the desired insurance, and aver that the entire amount proposed was never secured. Some of the agencies insisted on the same conditions as to cancellations as those fixed between said Barrett and said Tyler & Rutherford, and cancellations by orders of the different companies were so frequent that said Tyler & Rutherford could not at any time before May 16th know how much of binding insurance was in hand. Of all these facts the said R. K. Tyler avers that he informed the said Duncanson in the progress of the effort to secure insurance and some time prior to the fire. The said Duncanson denies that he had information as to any of these facts at any time prior to the fire, except the fact that there was difficulty in procuring the desired insurance. No specific mention, however, of the two policies of the defendant was made to said Duncanson or any one connected in any interest with the Ivy City Brick Company.

11. On the 16th of May, 1895, a clerk of Tyler & Rutherford was directed to make up the account of the policies on hand and put them in a package for delivery. The two policies of the Hartford Fire Insurance Company, which had been overlooked and were then lying in the same drawer with the other policies, taken in fulfillment of this order, were included in the account and placed in the package with said other policies by said clerk of Tyler & Rutherford without the personal knowledge of said Tyler & Rutherford and both were handed to said Duncanson by said R. K. Tyler, said Tyler not examining the same. Said Duncanson took the package and engaged to pay the account on the Monday week following, to wit, May 27, 1895.

12. On the morning of May 17th, after the fire, which occurred about one o'clock a. m. on that day, said R. K. Tyler came to said Duncanson and asked for the return of the two policies, stating that they had been handed him by mistake and the fact of their previous cancellation, said

Tyler averring that he did not know that the property described as insured had been destroyed. Later, on that day, when the fact was known that the property described in the policies was destroyed, Tyler & Rutherford, by telephone, informed the Washington Loan & Trust Company, the beneficiary of the trust held by Wilson *et al.*, trustees, that the Hartford policies had been delivered by mistake and requested it to send back the two policies, and were answered that they were locked up, but would be returned the next morning.

Of this request and answer by the telephone it is agreed that the Ivy City Brick Company knew nothing at the time, and when informed of said request directed that the policies be not returned. The policies were not returned, and sundry correspondence followed between said Tyler & Rutherford, said Duncanson, and the Washington Loan & Trust Company, in the course of which said Duncanson sent a check to Tyler & Rutherford for the settlement of the account above referred to. Tyler & Rutherford
16 refused said settlement, stating that the two policies of the Hartford were void and had been sent in by mistake, and returned the check, with a corrected account, excluding these policies. The correspondence between said Duncanson, said Tyler & Rutherford, and said Washington Loan & Trust Company and the policies sued on may be filed with this statement and considered as part of this agreed case.

13. Defendant waives any claim of laches or irregularity as to notice of loss, or as to the particular account commonly called proof of loss.

14. The parties hereto reserve the right to except to the rulings of the court on the aforegoing agreed case. The court shall be considered as having directed the jury to find a verdict in favor of the party for whom the court itself shall find in accordance with the stipulation following, and either party hereto shall be considered as having filed an objection to such ruling or rulings of the court and having duly taken exception thereto, and said party so excepting shall be allowed an appeal thereon to the Court of Appeals,

and this agreed case shall be filed in the said court as the proper bill of exceptions herein.

On the above state of facts it is agreed that should the court find for the plaintiff judgment shall enter for $2,000, with interest from October 7th, 1895, and costs.

And should the court find for the defendant, judgment shall enter for the defendant, with costs.

BLAIR & THOM,
Attorneys for Plaintiff.

WOLF & ROSENBERG,
Attorneys for Defendant.

POINTS.

Defendant relies on two propositions:

FIRST—That the Policies on which plaintiffs claim were never completed as contracts by delivery or by acceptance.

SECOND—That, if delivered and binding at any time, these Policies became void and dead by cancellation, in accordance with an agreement not in conflict with any of their conditions, and also in accordance with their conditions, had no such agreement existed; and that they were so void and dead before the time of the fire in the declaration set forth.

ARGUMENT

In support of our first proposition:

Delivery with intent to deliver, and acceptance with the intent to accept are necessary to make any contract binding on both parties to it.

If Barrett had no authority to make the contracts described in the policies, and that fact was known to Tyler & Rutherford, it cannot be conceived that the policies would bind the defendant.

If he had authority to make the contracts they describe, it must follow that *his* intent to deliver must govern the question of *binding delivery.*

So, also, with acceptance by Tyler & Rutherford. They had authority to "PLACE" INSURANCE for the plaintiff, that is, to make contracts for insurance.

Somebody had to accept any proposed contract to make it binding. Surely it could not be the plaintiff before he ever heard of the negotiations or the papers. It was a necessary implication of their employment, that Tyler & Ruthford were clothed with that function. Their intent must govern the question of *binding acceptance.*

If, as agents to place insurance for the plaintiffs, they had no authority to take anything but binding and completed papers into their hands, the result would be that their powers did not apply and could not apply as agents until, under the terms of their agreement with Barrett, the papers became binding and completed contracts. Their action was only a preliminary effort to bring about a state of things in which they could act within the scope of their powers. Such action could not commence until the conditions precedent had been fulfilled.

There is no escape from this result. They were acting only for themselves, they were bound only for themselves, as they did take delivery and did take acceptance subject to conditions precedent.

If these were not in the scope of their powers, AND IF CONDITIONS PRECEDENT CAN CONTROL THE EXISTENCE OF CONTRACT, their want of power could not destroy such conditions, could not complete the contract, but would prevent their agency from being in operation at all. Their principal was not bound in any way—if not by the conditions precedent then not by the papers they held. Their custody was not the custody of their principal. If it could not be conditional under their powers as agent, and was in fact

conditional, it could not be the custody of their principal.

Suppose that Barrett had placed the papers in Tyler's hands for inspection, to ascertain if he approved its numerous conditions, with the promise that it would be returned, to be held by Barrett until his Company decided on the acceptance of the risk. Would Tyler's custody then have been the custody of plaintiff? The plaintiff would have had no relation whatever to it. The functions of agency would not have commenced until Barrett proffered complete delivery and Tyler could make complete acceptance.

No casuistry can discover any difference between such custody and that of the agreed case. No casuistry can make his custody under the conditions he accepted an act of agency under powers as restricted as it is suggested his were. The papers had gone into his hands only as *an act of mutual convenience* to be held as agent of the plaintiff if and when they matured as contracts, or returned as an individual if they failed so to mature by the rejection of the risk.

Let us look at the acts and declarations of these parties as fixed by the agreed case.

"Barrett stated that the *proposed risk* was a special hazard, and that he doubted his authority to *accept* it before reference to his principal, but he would issue policies * * * *upon the condition that the same should not be delivered to their principals* until the *decision* of the Hartford Fire Insurance Company on *the acceptance of the risk* was duly had, and should be subject to immediate cancellation (the five-days' notice in the policy conditions being waived) *by notice that the Company rejected the risk.*"

If, by any construction, this can be tortured into an intent to deliver except upon precedent condition that the *risk* MUST BE FIRST ACCEPTED by the Company, because he doubted his power himself to accept it, we are unable to comprehend it.

The phrase, "and should be subject to immediate cancellation (the five-days' notice in the policy conditions being waived) by notice that the Company rejected the risk," does not qualify it in the least.

Interpreted by its context, and by the contemporaneous action of the parties, the universal canons of interpretation, it can mean only that the paper being dead by the failure to accept the risk, nothing in the paper itself shall entitle Tyler & R. to hold it. It must be given up at once for destruction on notice that the risk was rejected. It shall be subject to immediate destruction and cancellation as a paper, not necessarily as a contract. It could not be a contract covering a risk, when the risk itself had never been "accepted," when it had been *referred for acceptance or rejection before it was to be delivered.*

And on the part of Tyler & R., the agreed case says, (Sec. 3d)—"This condition (not this contract) was accepted by Tyler & Rutherford, and the two policies of insurance were thereupon written *and placed in their hands.*"

Since the counsel for plaintiff seems to see a pregnant difference between a "conditional delivery" and a "conditional acceptance" of an instrument of contract, a difference which we shall show by authority has no foundation in law, it is no strained construction of this statement to say that Tyler & R. not only agreed that the delivery was on condition precedent, but *their acceptance was on condition precedent likewise.*

In effect they said—We take these papers into our hands not accepting them absolutely. You have told us that you doubted your authority to accept the risk; we will not accept them for delivery as completed contracts for which we are to pay the consideration—the premium—until all doubt is removed and *the risk* is *accepted* by your principal.

There was not only admitted conditional delivery, but required conditional acceptance. There was neither delivery with intent to deliver, nor acceptance with intent to accept.

Such was the plain intent of Tyler when he accepted the condition. He had not accepted the papers as contracts. They had not been "placed in his hands" except under a condition, the reason for which had been clearly and distinctly stated. His acceptance to complete delivery, and without which delivery could not be complete, awaited

a condition precedent—the *acceptance* of the risk by the Company itself, about which no doubt of authority could exist.

The terms used in the dealings between the respective agents admit no other rational construction.

And when the mutual action of the parties in the premises was had, so closely on the heels of the negotiation as to make it contemporaneous and coincident, the intent shown was precisely in accord with this plain common-sense interpretation of the language they had used.

The actual text of the agreed case is plain and brief enough as a statement of the facts without the danger of epitomizing. (We refer to paragraphs 4, 5, 6 and 7 of the agreed case.)

The Company had acted. Through its special agent, known by Tyler & R. to be the representative of the Company, having authority to inspect, confirm or cancel risks for and on behalf of the Company, on his first inspection visit to Washington, only ten days after the policies had gone into the hands of Tyler & R., they were informed that the Hartford "*refused to 'carry'* the risk"—*not refused to continue*, not *refused longer to carry*—and ordered the cancellation of the said policies.

Ordered whom? It was not the province of defendant to order Tyler & R., nor the province of Tyler & R. to cancel. It was the province of the agent who was subject to its order.

And on the same day, when Barrett, on his way to the office of Tyler & R., met the member of that firm who had exclusive charge of the matter, and informed him that the Company ordered cancellation, Tyler responded, "all right, send up and get them," all possibility of controversy or claim was ended, and they became in law as effectually ours, lying in Tyler's drawer, as if they had been manually given back.

The sickness of Barrett kept him from knowing that the papers were not in his office. He did know that he had "*immediately*" ordered an entry of cancellation on his books, and the entry had been made immediately—so says the agreed case; and Tyler had forgotten all about them.

And the next step in mutual action. Three days thereafter, when the customary mutual accounts of business between the offices on the first of the month were settled, those accounts which would determine if premium was charged on the one hand and credited on the other—no charge appeared, nothing was asked for, nothing was proffered. The accounts were closed; the policies were treated as what they were—dead instruments. There was no charge and no proffer of premium to cover the ten intervening days, as must have been the case had the parties intended or understood that the risk was covered for those ten days. It would have been to the interest of both that premium should accrue, as their only compensation in commissions depended on the fact.

These acts of the parties leave no room for doubt that their intent was exactly what the plain meaning of the agreement shows upon its face.

UNLESS THEN IT IS NOT COMPETENT TO SHOW BY PAROL EVIDENCE that these papers went into Tyler & Rutherford's hands, subject to a precedent condition governing their delivery or acceptance as completed contracts, they never were contracts.

At the threshold of this question *it is worthy of grave consideration by this court in what way this question properly belongs to this case.* It would seem an anomaly to inquire if evidence of a condition precedent be admissible, *when the condition itself has already been distinctly admitted in the agreed case.*

On objection if valid a court might well rule that it was not admissible to prove that a condition of delivery or acceptance existed by agreement; but must not such condition govern when it stands admitted as a fact before the court? If it must govern then this case is concluded. The intent of the parties is established beyond controversy. *It is too late to object to the mode of proof, when the facts which establish the intent are admitted.*

We pass, however, to the discussion as if the facts were proffered in evidence instead of admitted, as they incontrovertibly are.

The whole argument of counsel for plaintiff begs the question at issue and assumes that there was unconditional delivery, and when it states any matter as fact from the agreed case remotely touching it, distinctly perverts and distorts the statement of the agreed case.

We hold and propose to establish on authority, THAT ANY INSTRUMENT IN WRITING, ALTHOUGH PASSED INTO *the hands of the party to whom it is to more by the party who makes it, must await the performance of a condition precedent either to delivery or acceptance* before it becomes a contract, and failing the performance of the condition the paper is not binding, unless it be a negotiable instrument passed to a third and innocent holder; and WE HOLD ON AUTHORITY THAT THE INSTRUMENTS HERE INVOLVED FORM NO EXCEPTION.

The courts have drawn a sharp distinction between conditions which go to make up a contract itself, and conditions which determine if and when it becomes operative and effective between the parties to it. They do not permit parol evidence to vary its conditions when it is completed as a contract by absolute delivery and absolute acceptance. Both parties must then stand by its text, because parties have agreed to that text—the two minds have met—and that text expresses what they have agreed to be bound by. In other words, the court will not permit parol evidence to show what is the contract when the writing defines it.

But the courts do permit parol evidence to show that a paper, however complete in form, although placed in the hands of the party to whom it purports to move, is not delivered or accepted, if some precedent condition is attached to such delivery or acceptance, until the exacted condition is satisfied; and the courts beyond dispute now hold that when such parol evidence is clear, and the conditions of delivery are not performed, the instrument is not a contract.

In support of this general proposition we need go no further than the case of Burke *vs.* Dulany, 153 U. S. 228, where the principle is broadly adopted that "THE MANUAL DELIVERY OF AN INSTRUMENT MAY ALWAYS BE PROVED

TO BE ON A CONDITION WHICH HAS NOT BEEN FULFILLED IN ORDER TO AVOID ITS EFFECT."

A number of cases are cited and approved by the court to which we beg to refer.

In that case, as in all cited in it, the contention was, that a different rule was "safer;" that "it prevents the uncertainty and the opportunity for controversy and imposition that would naturally follow from making the binding effect of a completely executed and delivered instrument of contract (if it be not begging the question to call that completely executed and delivered, the completeness of whose execution by reason of the character of delivery was the very point of discussion), depend upon verbal conditions of delivery;" and that "any inconvenience or hardship from its enforcement may be avoided by withholding the instrument until the suggested conditions or pre-requisites were fulfilled." This reasoning did not prevent the application of the principle adopted by the court to a negotiable note, absolutely unrestricted in its terms, and passed from the hands of the maker to that of the payee. The court announced a principle; and when a case comes before this court in which the conditions constituting the instrument before it are as clearly as possible separated from the conditions precedent attending its going into the hands of the party to whom it moves, which make delivery and acceptance merely manual, TO REFUSE TO APPLY THE PRINCIPLE IS TO OVERRULE THE COURT WHICH ANNOUNCED IT.

We affirm with absolute confidence that there is not one condition in the policies defining or restraining the powers of the agent, the obligations of the Company, the rights or restraints upon the insured, or in any way touching the text of the instrument, which does not simply form part of the contract itself to operate only when, as in the case of other instruments of contract, it is delivered or accepted; not one line or word to affect the rule laid down by the Supreme Court. All of the conditions go to the completion of the instrument, none to affect the attaching of the contract by delivery and acceptance.

In the negotiable note, to which the Supreme Court ap-

plied the principle, there is one phrase that does suggest an admission that the condition precedent which defeated it was fulfilled—the words "for value received." Here there is nothing like its equivalent.

The phrase "this policy is made and accepted subject to, etc.," gives no such suggestion. It applies and can apply only as a descriptive part of the instrument of contract.

On this interpretation of the character of the restrictions and limitations of the power of the agent in a policy of insurance, we have the direct authority of the Court of Appeals of N. Y., expressed through Justice Peckham, in Harnickell *vs.* N. Y. Life, 111th N. Y.

Counsel have attempted to avoid the force of the decision and opinion of that court, by refusing attention to the leading point of discussion and decision, and referring to a collateral and alternative ground stated in the opinion, and as to that part we think the meaning of the opinion has been misapplied.

The leading point of contention in that case was: whether conditions restraining the agent in the matter of premium payment brought home to the party to whom manual tradition was made, by a holding of the policies for months, before notice to the Company, did not preclude the suggested conditional delivery and acceptance.

What was the answer of the court? It covers every suggestion here. It said: "The condition precedent to delivery and acceptance was not affected by the restrictions." It placed the doctrine of precedent condition on the authority of Benton *vs.* Martin alone, a case in which delivery alone was touched, and used this language, exactly applicable here:

> "THE PROVISIONS IN THE POLICIES, WHICH ARE ABOVE QUOTED, RELATE TO THE POLICIES THEMSELVES AFTER THEY SHOULD BECOME EXECUTED INSTRUMENTS BETWEEN THE PARTIES."

The following explanation and comment are conclusive.

This was decisive of the case, and is authority. After deciding the case on this broad basis, the court went on to

show how, even if the case could not be determined on this broad ground, there was still another ground on which decision might rest, to wit: that even if the agent had no power under the restrictions of the policy to accept conditions precedent to the completion of the contract by delivery, Harnickell's power to impose conditions of acceptance was not restrained. And this branch of the decision is as forcible here as there, since Tyler & Rutherford's *acceptance* of the paper was upon the condition that the Company accepted the risk, and as the acceptance of the risk failed, the contract failed.

If by this high judicial authority this precise character of contract had not thus been brought within the operation of the principle so luminously and broadly stated in Burke *vs.* Dulany, we are unable to see why a policy of insurance, as an "instrument of contract," should be excluded.

Especially would it seem equitable that such a principle should stand guard over transactions by agents of distant Companies. There is no class of instruments of contract which more frequently go into the hands of others completed as instruments, but not completed as contracts, because subject to conditions of complete delivery or acceptance. The multitude of conditions and restrictions of policies would seem to make this a necessity. It would be a great hardship, a most embarrassing condition, to impose on them the rule that mere manual tradition was completed delivery; quite as great a hardship as would be the correlative rule that mere manual possession was completed acceptance. A most instructive case in this point of view is Millville Mutual Ins. Co. *vs.* Collerd, N. J. C. E. 38th N. J. 480, which, in fact, covers almost if not the whole question.

Before passing from this branch of the discussion, we ask the further attention of the court to the effect claimed by plaintiff of the phrase in the condition of delivery and acceptance," and should be subject to immediate cancellation (the five-days' notice in the policy conditions being waived) by notice that the Company rejected the risk."

The claim is:

1st. That an agreement that a provision of the policy was

waived, involves an admission that the policy containing the provision was in force, because there could be no waiver of a provision not in force.

2d. That no such agreement could be condition precedent to the attaching of the contract.

3d. That if made it must be inoperative, as it was not written upon or attached to the contract itself, because, they claim this is forbidden by the last paragraph of the policy itself, to wit:

> "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of the Company shall have the power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement, indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

4th. That cancellation can only apply to existing and active contract, and agreement to cancellation on a contingency concludes the fact that the contract was to be in operation.

5th. That unless their interpretation be correct, it would involve of necessity a payment of premium for an indefinite time without insurance in the interval between the date of the policy and its actual operation, which would be a fraud on the insured.

We think we have irrefutably shown that the plaintiff's construction of this phrase is wholly unwarranted; that the intent attributed to the parties is irreconcilable with the context, and inconsistent with the immediate action of the parties to the agreed condition.

We proceed to show THAT THE PLAINTIFF IS MISTAKEN IN THE CONSEQUENCES WHICH WOULD FOLLOW IF THE IN-

TENT WAS WHAT THEY CLAIM. It would be a binding and effective condition if it left out entirely any requirement that the Company should accept the risk before it could become operative, and read: "Upon the condition that the same should be held by Tyler & Rutherford and not delivered to their principal until the decision of the Hartford Insurance Company comes, whether or not it would order the cancellation of the policies, and they be subject to immediate cancellation on notice of such order (the five-days' notice in the policy conditions being waived)."

1st. It will not be disputed that such an agreement, once established as such, would be obligatory on the plaintiff (and if it were established as a condition precedent to the delivery of a paper, it would make no difference), unless it conflicted with some distinct condition or clear implication of the contract itself, or unless all conditions are inadmissible.

Here the postulate is that it is an admitted fact, that the condition *was made and accepted*.

2d. Unless the last paragraph of the policy operates to defeat such a condition, THERE IS NOTHING WHATEVER IN THE CONDITIONS OF THE POLICY TO FORBID ITS OPERATION.

The policy provides for its cessation as a contract at any time, at the instance of either the insured or the Company. The terms expressing this are: "This policy shall be cancelled at any time at the request of the insured; or by the Company, by giving five days' notice of such cancellation."

Both, by the terms of the paper, have a right to stop the operation of the paper as a contract—the insured to do so immediately by a request, the Company by a notice which it is the right of the insured, under the policy, to have five days before it becomes effective—and under the authority of Grace *vs.* Ins. Co., 8 Ins. L. J. 95, in which the Sup. Court acquiesced, PAROL NOTICE is effective.

NOW IT IS NOWHERE A CONDITION IN THE POLICY THAT THE INSURED MAY NOT WAIVE ANY RIGHT SECURED HIM in the instrument; it is NOWHERE REQUIRED THAT ANY WAIVER BY THE INSURED SHALL BE WRITTEN UPON OR

ATTACHED TO THE POLICY. The prohibition against waiver is that "no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto."

The only prohibition to the insured is—"nor shall any privilege or permission *affecting the insurance* under this policy exist or be claimed by the insured unless so written or attached." The right to assent to the immediate abandonment of the contract by notice is not a privilege or permission *affecting the insurance* under this policy. THE WAIVER WAS NOT A WAIVER BY ANY AGENT OR OFFICER, it was a waiver by the insured himself.

So there is nothing in the policy itself requiring that it be written on the paper to be effective.

When it is an agreed fact, not simply a proffer of evidence to prove as a fact, that the condition precedent to the paper going into the hands of Tyler & Rutherford was that it should be held by said Tyler & Rutherford subject to immediate cancellation by notice of an order of the Company to cancel, and that condition was accepted, we are unable to see why it should not be effective.

The policy not only provided for cancellation but for the abatement of premium and pro rata repayment. The sole effect of the condition, interpreted as it is by the plaintiff, was an agreement for insurance, terminable on notice at a stated premium. If they intended what plaintiff claims, that such was the intent of both parties, then Tyler & Rutherford placed insurance for one year terminable at the election of either party by notice, which the law allows to be by parol. That is precisely what this policy is, with the exception that the assured has the right in it to require five days' notice. It would be ridiculous to say that the power in Tyler & Rutherford to place insurance forbade them to take a policy terminable on notice without the right to five days' notice.

The only result then of the interpretation insisted on by plaintiff would be that he would owe us pro rata premium for the ten days before the notice of cancellation.

The interpretation of the plantiff would not advance his contention a single step.

The clumsiness of the contrivance to produce such a result, however, is a conclusive proof that no such meaning could have been contemplated by the two parties to the condition as stated in the agreed case.

It is a notorious fact that the method of accomplishing such a purpose is by what is known as a "binding receipt," and if the fact is not of such common knowledge as to receive judicial cognizance, still the improbability of such clumsiness is pregnant proof that no such intent moved these parties.

As for the objection that our contention as to the meaning of the condition would give us the opportunity of fraud on the insured by postponing decision for an indefinite time, but for respect for the learned counsel we would say it is frivolous. The necessary implication was that decision would be in a reasonable time. The decision was given in a reasonable time. *De minimis lex non curat.* The remedy for unreasonable delay was at all times in the hands of Tyler and Rutherford.

We pass to our second proposition:

THAT IF BINDING AT ANY TIME THESE POLICIES BECAME VOID AND DEAD BY CANCELLATION IN ACCORDANCE WITH AN AGREEMENT NOT IN CONFLICT WITH ANY OF THEIR CONDITIONS AND ALSO IN ACCORDANCE WITH THEIR CONDITIONS HAD NO SUCH AGREEMENT EXISTED, NOTICE OF CANCELLATION HAVING BEEN PROPERLY GIVEN; AND THAT THEY WERE SO VOID AND DEAD BEFORE THE FIRE IN THE DECLARATION SET FORTH.

The policies provide that they may become void by notice of cancellation.

There is no question, as we understand, of the form of the notice given (Par. 4. p. 7, Transcript of Record); no question that it was complete and effective if it was given to the proper party; no question that, if given to the proper party the policies became and were void and dead long before May 17, when the fire occurred.

As to this the terms of the policies themselves are too explicit and the authorities too distinct and unequivocal for contention. Under an equivalent condition Judge Benedict declares:

> "Neither the law nor the contract requires a written notice of cancellation. It was not necessary that the policy be returned to effect a cancelment of contract. By this contract the parties have agreed that a notice of cancelment shall put an end to it."
>
> Grace *vs.* Insurance Company, 8 Insurance Law Journal, 96.

The Supreme Court of Pennsylvania say the same in South Side Insurance Co. *vs.* Mueller, 8 Ins. L. J. 260.

It is in fact the *concessum* of every case cited by plaintiff in error.

The only question at issue in this connection is: Was the notice to Tyler & Rutherford efficient? Were they the proper parties on whom to serve such notice, rather than on the plaintiff?

It would seem a sufficient answer to say that had notice been given to the plaintiff instead of to Tyler and Rutherford but one response was probable. "We know nothing of the policies. Tyler and Rutherford have made no report of progress to us."

Had such a notice been effective, Tyler & Rutherford would have held empty papers, and continued their work under a false and hazardous impression of what they had accomplished.

The plaintiffs say they were the only parties on whom the notice could be legally served. They admit as a fact that it was served on Tyler & Rutherford; admit as a fact that at the time it was served the existence of the policies was wholly unknown to them, and in the hands of Tyler & Rutherford; admit as a fact that they were so held by Tyler & Rutherford in compliance with a condition, without the acceptance of which they would not have been issued and would not have gone into their hands at all—to-wit: that they should be held and not delivered to their

principals until the distant defendant could be advised of the risk and exercise a right of cancelation *reserved in the policy* if it disapproved the risk; admit as a fact that up to May the 16th some of the other agencies from which they held policies insisted on the same conditions as to cancelation as those fixed between said Barrett and said Tyler & Rutherford and that cancelations by orders of the different companies were so frequent that said Tyler & Rutherford could not before May 10th know how much binding insurance was on hand, and of necessary consequence, that said Tyler & Rutherford were up to that time still agents to *place insurance* for them and to fill as far as possible the desired amount: they admit that premium arrangements concerning these policies were exclusively in the hands of Tyler & Rutherford, and premium settlements were to be in the mutual monthly accounts between Barrett and Tyler & Rutherford, and that after the notice, while Tyler & Rutherford were their agents in this regard, they had in settling the mutual account *settled* that no premium was due, and had in effect given up the policies although not manually returning them; and yet they say the policies were still alive and active contracts because the notice of cancellation was not given to them.

Their argument is that:

1st. The authorities are conclusive that an agent to procure insurance, although by the terms of the policy made the agent of the insured, is not an agent for the purpose of receiving notice of cancellation—relying on Ins. Co. *vs.* Grace, 109 U. S., 298, and cognate cases.

2d. There is nothing in the agreed statement to warrant the conclusion that the brokers' agency or employment extended any farther than the procurement of the policies.

3d. "That when executed and delivered—*assuming that the delivery was unconditional and complete*—their agency ended."

4th. "That the broad rule is that notice must be given to the assured" (whether he knows or not of the existence of the policy), "and it would be inconsistent with the general

principles of the law of agency, applied in Grace *vs.* Ins. Co., to hold that *because a policy is suffered to remain in the hands of the agent for its procurement he becomes the general agent of the insured, for that would be the necessary effect*, with power to alter, to rescind, and to accept notice of cancellation, and bind the assured without his knowlenge or assent. To give such effect to the *mere possession* of the policy would be to *raise* a limited agency for no reasonable purpose. Moreover, it would be fraught with great danger to the vast interests of insurance.

5th. That merely *permitting the policies* to remain for a time and uncalled for in the hands of the brokers, *which is all that this record discloses*, is perfectly consistent with the idea of the termination of their agency.

6th. With the receipt of the policy a new relation is created between the insured and the broker, that of depositor and depository: the possession of the broker became, in law, the possession of the insured, and nothing more; his sole duty is to deliver the policy upon demand of the insured, or within a reasonable time without demand.

WE PROCEED TO SHOW THAT EACH AND ALL OF THESE PROPOSITIONS RESTS, TO PHRASE IT WITH ALL DUE RESPECT, UPON A MISTAKE—a mistake of the facts involved, of the law as stated, or of the application of the law as stated to the facts involved. We take them seriatim, at the hazard of tedious reiteration, commencing with the 2d as the 1st, will have discussion in another connection.

The 2d proposition is: "There is nothing in the agreed case to warrant the conclusion that the broker's agency or employment extended any further than the procurement of the policies."

Let us look at what the agreed case says and of necessity implies.

Its first paragraph is: Plaintiff "authorized the firm of Tylor & Rutherford, at their request, *to place insurance* for the company" (the plaintiff), "said Duncesson averring the amount to be placed to be the sum of $10,000, and Tyler & Rutherford averring a much larger sum."

Was this a simple agency or employment to procure the two policies of the defendant and to deliver them to the plaintiff when procured or keep them until called for? So as involve as a consequence plaintiff's 3d proposition, that when these two policies "were executed and delivered, *assuming* that the delivery was unconditional and complete, their agency ended?" Was nothing confided to them when authorized to place insurance for the company up to $10,000 except to go and get these two policies for $2,000? As the authority was *to place* insurance, and not simply to get a Policy of some named Company, it is not conceivable that if on reading any Policy sent them the conditions were unsatisfactory, or if, on information, they doubted the authority of the agent to make it, they had no discretion to send it back and supply its place by satisfactory insurance, until they had placed the whole amount; it is not conceivable that because a Policy had come into their hands for $2,000 before they had completed their commission they must send to the Plaintiff to get instructions about its retention. Their agency was continuous and their discretion full until they had completed their work, reported and placed the papers in the hands of the Plaintiff, either actually or constructively.

Then, and not till then, could the policies be fairly said to be '*suffered*' to remain in the hands of the agent.

Then, and not till then, could the suggestion apply that 'to give such effect to the *mere possession of the policy would be to receive a limited agency for no reasonable purpose.*'

It is undoubtedly true as stated in the 4th proposition that "it would be inconsistent with the general principles of the Law of Agency that because a policy is suffered to remain in the hands of the agent for its procurement he becomes the general agent of the insured, with power to "do all sorts of harmful and dangerous things including an acceptance of notice of cancelation." But the suggestion is not pertinent to the facts disclosed in the agreed case.

The implication of authority in an agent is that he may do anything not violative of instructions, nor inconsistent

with the purpose of his agency, nor the interest of his principal, which will advance the object of his agency. Here there were no instructions. Here Tyler & Rutherford distinctly announced, by unmistakable action, their authority to accept notice of cancelation; here that authority was not only directly consistent with the purpose of the agency, but distinctly in the interest of their principal, and distinctly advanced the object of their agency. Without such power their hands would have been tied, possibly to the serious damage of their principal.

In addition to this, the fact that premium payment was to be made in the mutual settlement of accounts between Barrett and Tyler & Rutherford would imply that while the Policy was in their hands undelivered to the Plaintiff notice to them was proper, because not only notice but *pro rata return of premiums* are needed to complete the right to cancel, May, Sect. 574. Return of pro rata premiums could not be made to Plaintiff. It could only be to Tyler & Rutherford in adjusting their accounts. Must the two acts be separate? one moving to the Plaintiff who could not complete the right, the other to Tyler & Rutherford, who could not recognize the fact of notice except from the plaintiff?

We see nothing in this case to distinguish the authority touching cancellation on April 27th, before they had completely placed the whole $10,000, from the authority exercised by the Agent and approved by the Court in Standard Oil Co. vs. Triumph Ins. Company, 64th N. Y., 85.

Not only was this power consistent with the purpose of the Agency until its whole object was attained, but Tyler & Rutherford had authority to make the specific engagement disclosed in the agreed case, which implied of necessity that the notice should come to them. They had discretionary power to overcome the difficulty of *procuring the desired insurance* of which Plaintiff was informed (Sect. 10 of agreed case). They had power to meet this difficulty, and *place the insurance* on any reasonable terms to fulfil the whole purpose and scope of their employment, by making an engagement that the instrument affecting it, without changing one line or letter or implication of the

instrument, without impairing by a shadow of a shade the fact of insurance being placed and affective to secure the Plaintiff up to every limitation of the instrument expressing it, should be so held that prompt effect might be given to notice of cancellation, which the Policy itself authorized, and they themselves if cancellation came might promptly perform the duty of placing insurance, not yet exhausted, and fill any gap, until they had reached the whole limit and ended their commission. They did so agree. They so agreed, not only in the interest of their principal because the insurance was refused and very properly refused unless they would so agree, but because it was a safeguard to their principal. If it had been so arranged that notice to their principal was necessary, the notice would have been effective, without their knowledge—their principal would have had to notify them of the gap in the insurance he desired—their unexhausted powers to fill the deficit would have slept until they were so notified, and the interval might have brought disaster.

The terms were reasonable to exact, and reasonable to accept. The authority to make any reasonable terms not affecting the purpose for which it was given, but consistent with it in all particulars, was of the clearest implication.

We pass to a brief consideration of the authorities cited in support of plaintiff's contention.

We think we might safely rely upon them in support of our own.

Of the whole array of citations, none but the cases, of which Grace *vs.* The American Central, 109 U. S. 278, and Hermann *vs.* Niagara, 100 N. Y. 411, are the most conspicuous and complete, have anything but a purely academic interest.

These cases, when analyzed, distinctly support our contention. They decide that the broker, employed simply to secure insurance, when he has done so, and has *delivered the policy up to his principal*, has no further relation to it, and that his principal is not chargeable with notice of can-

cellation *thereafter given* to the broker, which does not reach him before the loss, notwithstanding a custom among insurance men of giving such notices to the broker, and that the court below misinterpreted a clause in the policy which it supposed made said broker the proper party to such notice.

This is all they decide.

In all three cases the policy had been deliberately turned over to the principal *before the notice*, and the very basis of the opinion of the court, in all of them, was that only on such delivery the broker's agency in relation to the policy ceased.

The necessary implication is that *up to that time it had not ceased*, and up to that time notice of cancellation to the broker would have been efficient. In the language of Benedict J., "would have put an end to the policy."

In the Grace case Judge Harlan says:

> "At the trial it was admitted that the contract between the parties was fully executed *upon the delivery of the policy to the insured* and when the contract was consummated by the *delivery of the policy*, he ceased to be the agent of the insured, if his employment was limited solely to procure the insurance."

The policy had been procured by the broker September 26, and was by him delivered to Grace & Co. September 27. The agent of the insurance company gave notice of cancellation to said broker October 6, and the property was burned October 7, before Grace & Co. ever heard of the notice.

In the Hermann Case, 100 N. Y. 411, Judge Andrews, after stating that "the authority of the agent terminates with the procurement of the policy," adds:

> "It cannot in reason be held to continue after the insurance has been procured and the policy delivered to the principal.

> "The defendant's agent knew that Kennedy & Buel (the procuring brokers), had sent the policy to the plaintiff in New York, and it was then in his possession. Plaintiff had no knowledge of the transaction in respect to cancellation until after the fire."

The stress of the opinion is the same as in the Grace Case.

In fact, it was the predicate of plaintiff's counsel. "Such agency," he says—

> "of Kennedy & Buel existed in reference to the policy in suit was one that the law implies from the receipt and retention of the policy then procured, and it naturally would and did terminate *when the policy had been delivered to the plaintiff* and the premium paid by him. *The possession of the policy was sufficient evidence of his authority to cancel or modify it.*"

We repeat: In both of these cases, as in all of the cases to which plaintiff has referred or can refer, the policy was a live, active, accepted contract when it went into the hands of the insured. It had been accepted without qualification by the procuring broker and by him delivered into the hands of his principal. No cancelation had been ordered or notice given to the broker until after that event, and no notice had ever reached the assured thus holding his policy. The relation of the broker to it had absolutely ceased. He could no longer have negotiated modification of its terms, or returned it for any cause, without its recommitment to him by the assured. Notice to him was notice to a stranger, and was therefore no notice.

Such, and such only, were the facts and effect of these decisions.

The circumstances here widely differ. Tyler & Rutherford, authorized by the assured to place their insurance (agreed case, par 1, p. 6 of Transcript), had procured two policies under the conditions described in paragraph 2, page

7 of Transcript, as follows: Barrett, the agent for defendant, stated to said Tyler & Rutherford that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal, but that he would issue policies upon the condition that they should be held by said Tyler & Rutherford and not delivered to their principal until the decision of the Hartford Fire Insurance Company on the acceptance or rejection of the risk was duly had, and should be subject to immediate cancellation, by notice that the company rejected the risk. The condition was accepted, and the policies went into their hands.

During the entire period between the employment of Tyler & Rutherford and the accidental falling of these papers into the hands of plaintiff, there seems to have been but one inquiry by Duncanson, manager for the insured, about the state of the insurance. According to him the only information given was that there was great difficulty in procuring the desired insurance, but, according to Tyler & Rutherford, he was informed that it was impossible to say what binding insurance they had, as some of the agencies insisted on the same conditions as those fixed between them and Agent Barrett, and cancelations were so frequent that they could not tell what was in force, no specific mention being made of defendant's policies (paragraph 10, page 8 of Transcript). There is no dispute that Tyler's statements are facts. The only doubtful point is the unimportant one, whether more was communicated to Duncanson than what he states.

Everything was left to the discretion and management of Tyler & Rutherford. They held the papers in good faith to both Plaintiff and Defendant.

They accepted the notice of cancellation, and doubtless did their best, as it was their interest to do, under their discretionary powers to fill the gap created. All this was some weeks before the Policies were ever heard of by Plaintiff, and that only when they fell by accident into his hands. Paragraphs 9 and 11, page 8 of Transcript.

Plaintiff might quite as reasonably claim on them, if, after they had been made and recognized, as dead, they had been lost in transmission from Tyler's office to Barrett's and picked up in the street.

Before closing this paper, for the length of which we proffer the excuse that it seemed necessary to thorough examination of the questions involved, we ask the Court to test the theory of the Plaintiff on a reversal of the position of the parties, on the hypothesis that we were seeking to recover premiums for these Policies, if they had never found their way by accident into Plaintiff's hands, had been sent back on April 27th, or had stayed in Tyler's drawer, and been found and returned to us by Tyler after the year was out, and there had been no fire.

By the theory the Plaintiff asks this Court to adopt, the Policies would have covered Plaintiff's interest and been earning premium of necessity all the time. The premium was earned and must be paid. The plea would be in vain that 'your Policy was never heard of.' 'I charged my agent with authority to place insurance, not to get me your policy. The paper passed into his hands on condition, both of delivery and acceptance, that it should not come into my hands until the expressed doubt of authority to issue it was removed by the action of the Company; the adverse action of the Company had promptly come while my agent still had power to place the insurance elsewhere, and he did or tried to fill the gap. He, in fact, practically gave up the Policies, and both parties settled their mutual accounts with the agreement that no premium was due.'

This plea would fall before the replication: 'That no condition precedent can affect the delivery of a Policy of insurance. That no agreed condition could have effect in any way after the Policy went into the agent's hand, because that was complete delivery and acceptance, and ended his agency, after which it stood in his custody only as if left in his care by the insured.'

The inexorable result would be that the premium must be paid. Nor would this result be changed if the Policy had been returned to the Company. In its hands by such a tenure its return would be a futile act.

How this theory would affect the vast interests of Insurance is not difficult to see. Millions of Polices have been passed into the hands of Agents authorized to place insurance, been returned to the Companies in the exercise of a wise discretion, witnout report to their employers, and replaced by more satisfactory papers. If a speculative idea of injurious consequence have any proper bearing upon the principles determinable by a Court, we affirm with confidence that those the Plaintiff asks this Court to adopt would lead to almost incalculable injury and wrong.

The Judgment appealed from was rightly given, and should be affirmed with costs.

SAML. B. PAUL,
Of Counsel.

ALEXANDER WOLF,
MAURICE D. ROSENBERG,
Attorneys for Defendant.

10128

No. 292, 79

FILED
NOV 12 1901
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States,
By. of Paul & Wolf for Petitioner

OCTOBER TERM, 1901.

Filed Nov. 12, 1901.

THE HARTFORD FIRE INSURANCE COMPANY,
Petitioner-Defendant,

vs.

ALBERT A. WILSON and JOHN B. LARNER, Trustees,
Respondents-Plaintiffs.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER.

SAML. B. PAUL,
Of Counsel.

ALEXANDER WOLF,
Attorney for Petitioner.

NEW YORK:
APPEAL PRINTING CO., 14-16 VESEY STREET.
Telephone, 192 Cortlandt.
1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE HARTFORD FIRE INSURANCE COMPANY, Petitioner, vs. ALBERT A. WILSON and JOHN B. LARNER, Respondents.	No. 292.

Brief for Petitioner.

After a full hearing in the Supreme Court of the District of Columbia on an agreed case before Bradley, J., judgment was given for the defendant, the petitioner here. The opinion of Justice Bradley on rendering this judgment appears in the petition.

On appeal to the Court of Appeals this judgment was reversed by a divided Court, Justices Shepard and Morris being for a reversal and Ch. Justice Alvey for an affirmance. Justice Shepard and Ch. Justice Alvey filed opinions, which appear in the petition and in the transcript of the record.

We might confidently rely on a critical examination of these several opinions, the record and our petition, but in view of the important questions involved shall attempt their discussion in full.

Statement of Facts.

The facts all appear in the Agreed Case, pages 6–9 (inclusive), of the Transcript of the Record, which we give in full.

Agreed Case.

Filed June 15, 1898.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

ALBERT A. WILSON, *et al.*, Plaintiffs, *vs.* THE HARTFORD FIRE INSURANCE COMPANY of the City of Hartford, Connecticut, Defendant.	At Law No. 38932.

1. Prior to April 17th, 1895, C. C. Duncanson, treasurer of the Ivy City Brick Company of the City of Washington, D. C., authorized the firm of Tyler & Rutherford, of said city, at their request, to place insurance for the company, loss, if any, payable to Albert A. Wilson, *et al.*, trustees under a deed of trust given by said company, as interest might appear, said Duncanson averring the amount to be placed to be the sum of Ten thousand dollars ($10,000), and Tyler & Rutherford averring a much larger sum.

On said April 17th, 1895, said Tyler & Rutherford, under the aforesaid authority, proposed to one Barrett, an agent, at said City of Washington, of the Hartford Fire Insurance Company, of Hartford, Connecticut, for insurance on properties of the said Ivy City Brick Company.

2. Said Barrett stated to said Tyler & Ruther-

ford that the proposed risk was a special hazard,
and that he doubted his authority to accept
12 it before reference to his principal, but
that he would issue policies amounting to $2,000, equally divided on the buildings and machinery, upon the condition that the same should be held by said Tyler & Rutherford, *and not delivered to their principals until the decision of the Hartford Fire Insurance Company on the acceptance of the risk was duly had, and* should be subject to immediate cancellation (the 5-days' notice in the policy conditions being waived) by notice that said company *rejected* the risk.

3. This condition was accepted by said Tyler & Rutherford, and the two policies of insurance in the declaration set forth were thereupon written and placed in their hands.

4. A short time thereafter, to wit, on the 27th day of April ensuing, on the first inspection visit to Washington after the issue of said policies, William R. Royce, the special agent of the Hartford Fire Insurance Company, known by said Tyler & Rutherford to be the representative of the company, having authority to inspect, confirm or cancel risks for and in behalf of said company, went to the office of said Tyler & Rutherford and informed them that the Hartford Fire Insurance Company *refused to carry the risk* and ordered the cancellation of the said policies, and on the same day the said Barrett, being on his way to the office of Tyler & Rutherford, met R. K. Tyler, a member of that firm, who had made the negotiation for the policies, had the same in his custody, and had exclusive charge of the

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matter, and announced to him that the company ordered their cancellation; to which the said Tyler responded, "*All right; send up and get them.*"

5. The said Barrett sent three times to the office of Tyler & Rutherford for the policies. Each time his employee was informed by one of the
13 clerks of Tyler & Rutherford that Mr. R. K. Tyler, who had charge of the policies, was absent from the office, and they would have to see him.

6. Said Barrett was taken sick and did not appear at his office for some days, but had immediately ordered the entry clerk to make the customary entry in such cases on the register where the policies were noted: "Cancelled by order of company," which was accordingly done.

7. On the first day of May ensuing the customary mutual accounts of business between the offices of said Barrett and said Tyler & Rutherford were settled, and the two policies were treated as dead, no charge for their premiums being presented on the one hand or asked for on the other.

(Mem.—of the facts recited in the second clause of paragraph 1 and paragraphs 2, 3, 4, 5, 6 and 7 above set forth, no party connected with or interested by mortgage or otherwise in the Ivy City Brick Company had any knowledge until after the fire occurred.)

8. The existence of the two policies were never reported to the said Duncanson nor to any one connected with said Ivy City Brick Company by mortgage or otherwise, nor did he or they have any knowledg of or connection with said policies until they came into the hands of said Duncanson

on May 16th, 1895, and at no time prior to the fire had any party connected with or interested, by mortgage or otherwise, in the Ivy City Brick Company, any knowledge of the transaction between said Barrett and said Tyler & Rutherford hereinbefore set forth.

9. The two policies had been overlooked by Tyler & Rutherford and lay in the drawer along with a number of other policies issued by other insurance companies which had been secured by said Tyler & Rutherford for the purpose of
14 filling the above order. Of this fact no one connected with the Ivy City Brick Company in any interest whatever was informed until after the fire.

10. Tyler & Rutherford had found great difficulty in procuring the desired insurance, and aver that the entire amount proposed was never secured. Some of the agencies insisted on the same conditions as to cancellations as those fixed between said Barrett and said Tyler & Rutherford, and cancellations by orders of the different companies were so frequent that said Tyler & Rutherford could not at any time before May 16th know how much of binding insurance was in hand. Of all these facts the said R. K. Tyler avers that he informed the said Duncanson in the progress of the effort to secure insurance and some time prior to the fire. The said Duncanson denies that he had information as to any of these facts at any time prior to the fire, except the fact that there was difficulty in procuring the desired insurance. No specific mention, however, of the two policies of the defendant was made to said Duncanson or any one connected in any interest with the Ivy City Brick Company.

11. On the 16th of May, 1895, a clerk of Tyler & Rutherford was directed to make up the account of the policies on hand and put them in a package for delivery. The two policies of the Hartford Fire Insurance Company, which had been overlooked and were then lying in the same drawer with the other policies, taken in fulfilment of this order, were included in the account and placed in the package with said other policies by said clerk of Tyler & Rutherford without the personal knowledge of said Tyler & Rutherford and both were handed to said Duncanson by said R. K. Tyler, said Tyler not examining the same. Said Duncanson took the package and engaged to pay the account on the Monday week following, to wit, May 27, 1895.

12. On the morning of May 17th, after the fire, which occurred about one o'clock A. M. on that day, said R. K. Tyler came to said Duncanson and asked for the return of the two policies, stating that they had been handed him by mistake and the fact of their previous cancellation, said Tyler averring that he did not know that the property described as insured had been destroyed. Later, on that day, when the fact was known that the property described in the policies were destroyed, Tyler & Rutherford, by telephone, informed the Washington Loan & Trust Company, the beneficiary of the trust held by Wilson, *et al.*, trustees, that the Hartford policies had been delivered by mistake and requested it to send back the two policies, and were answered that they were locked up, but would be returned the next morning.

Of this request and answer by the telephone it

is agreed that the Ivy City Brick Company knew nothing at the time, and when informed of said request directed that the policies be not returned. The policies were not returned, and sundry correspondence followed between said Tyler & Rutherford, said Duncanson, and the Washington Loan & Trust Company, in the course of which said Duncanson sent a check to Tyler & Rutherford for the settlement of the account above referred
16 to. Tyler & Rutherford refused said settlement, stating that the two policies of the Hartford were void and had been sent in by mistake, and returned the check, with a corrected account, excluding these policies. The correspondence between said Duncanson, said Tyler & Rutherford, and said Washington Loan & Trust Company and the policies sued on may be filed with this statement and considered as part of this agreed case.

13. Defendant waives any claim of laches or irregularity as to notice of loss, or as to the particular account commonly called proof of loss.

14. The parties hereto reserve the right to except to the rulings of the Court on the aforegoing agreed case. The Court shall be considered as having directed the jury to find a verdict in favor of the party for whom the Court itself shall find in accordance with the stipulation following, and either party hereto shall be considered as having filed an objection to such ruling or rulings of the Court and having duly taken exception thereto, and said party so excepting shall be allowed an appeal thereon to the Court of Appeals, and this agreed case shall be filed in the said Court as the proper bill of exceptions herein.

On the above state of facts it is agreed that

should the Court find for the plaintiff judgment shall enter for $2,000, with interest from October 7th, 1895, and costs.

And should the Court find for the defendant, judgment shall enter for the defendant, with costs.

BLAIR & THOM,
Attorneys for Plaintiff.

WOLF & ROSENBERG,
Attorneys for Defendant.

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POINTS.

Defendant relies on two propositions:

FIRST.

That the Policies on which plaintiffs claim were never completed as contracts by delivery or by acceptance.

SECOND.

That, if delivered and binding at any time, these Policies became void and dead by cancellation, in accordance with an agreement not in conflict with any of their conditions, and also in accordance with their conditions, had no such agreement existed; and that they were so void and dead before the time of the fire in the declaration set forth.

ARGUMENT.

In support of our first proposition:

Delivery with intent to deliver, and acceptance with the intent to accept are necessary to make any contract binding on both parties to it.

If Barrett had no authority to make the contracts described in the policies, and that fact was known to Tyler & Rutherford, it cannot be conceived that the policies would bind the defendant.

If he had authority to make the contracts they describe, it must follow that *his* intent to deliver must govern the question of *binding delivery*.

So, also, with acceptance by Tyler & Rutherford. They had authority to "PLACE" INSURANCE for the plaintiff, that is, to make contracts for insurance.

Somebody had to accept any proposed contract to make it binding. Surely it could not be the plaintiff before he ever heard of the negotiations or the papers. It was a necessary implication of their employment, that Tyler & Rutherford were clothed with that function. Their intent must govern the question of *binding acceptance*.

If, as agents to place insurance for the plaintiffs, they had no authority to take anything but binding and completed papers into their hands, the result would be that their powers did not apply and could not apply as agents until, under the terms of their agreement with Barrett, the papers became binding and completed contracts. Their action was only a preliminary effort to bring about a state of things in which they could act within the scope of their powers. Such action could not commence until the conditions precedent had been fulfilled.

There is no escape from this result. They were acting only for themselves, they were bound only for themselves, as they did take delivery and did take acceptance subject to conditions precedent.

If these were not in the scope of their powers, AND IF CONDITIONS PRECEDENT CAN CONTROL THE EXISTENCE OF CONTRACT, their want of power could not destroy such conditions, could not complete the contract, but would prevent their agency from being in operation at all. Their principal was not bound in any way—if not by the conditions precedent then not by the papers they held. Their custody was not the custody of their principal. If it could not be conditional under their powers as agent, and was in fact conditional, it could not be the custody of their principal.

Suppose that Barrett had placed the papers in Tyler's hands for inspection, to ascertain if he approved its numerous conditions, with the promise that it would be returned, to be held by Barrett until this Company decided on the acceptance of the risk. Would Tyler's custody then have been the custody of plaintiff? The plaintiff would have had no relation whatever to it. The functions of agency would not have commenced until Barrett proffered complete delivery and Tyler could make complete acceptance.

No casuistry can discover any difference between such custody and that of the agreed case. No casuistry can make his custody under the conditions he accepted an act of agency under powers as restricted as it is suggested his were. The papers had gone into his hands only as *an act of mutual convenience* to be held as agent of the plaintiff, if and when they matured as contracts,

or returned if they failed so to mature by the rejection of the risk.

Let us look at the acts and declarations of these parties as fixed by the agreed case.

"Barrett stated that the *proposed risk* was a special hazard, and that he doubted his authority to *accept* it before reference to his principal, but he would issue policies * * * *upon the condition that the same should not be delivered to their principals* until the *decision* of the Hartford Fire Insurance Company on *the acceptance of the risk* was duly had, and should be subject to immediate cancellation (the five-days' notice in the policy conditions being waived) *by notice that the Company rejected the risk.*"

If, by any construction, this can be tortured into an intent to deliver except upon precedent condition that the *risk* MUST BE FIRST ACCEPTED by the Company, because he doubted his power himself to accept it, we are unable to comprehend it.

The phrase, "and should be subject to immediate cancellation (the five-days' notice in the policy conditions being waived) by notice that the Company rejected the risk," does not qualify it in the least.

Interpreted by its context, and by the contemporaneous action of the parties, the universal canons of interpretation, it can mean only that the paper being dead by the failure to accept the risk, nothing in the paper itself shall entitle Tyler & R. to hold it. It must be given up at once for destruction on notice that the risk was rejected. It shall be subject to immediate destruction and cancellation as a paper, not necessarily as a contract.

It could not be a contract covering a risk, when the risk itself had never been "accepted," when it had been *referred for acceptance or rejection before it was to be delivered.*

And on the part of Tyler & R., the agreed case says (Sec. 3d)—"This condition (not this contract) was accepted by Tyler & Rutherford, and the two policies of insurance were thereupon written *and placed in their hands.*"

Since the counsel for plaintiff seems to see a pregnant difference between a "conditional delivery" and a "conditional acceptance" of an instrument of contract, a difference which we shall show by authority has no foundation in law, it is no strained construction of this statement to say that Tyler & R. not only agreed that the delivery was on condition precedent, but *their acceptance was on condition precedent likewise.*

In effect they said—We take these papers into our hands not accepting them absolutely. You have told us that you doubted your authority to accept the risk; we will not accept them for delivery as completed contracts for which we are to pay the consideration—the premium—until all doubt is removed and *the risk* is *accepted* by your principal.

There was not only admitted conditional delivery, but required conditional acceptance. There was neither delivery with intent to deliver, nor acceptance with intent to accept.

Such was the plain intent of Tyler when he accepted the condition. He had not accepted the papers as contracts. They had not been "placed in his hands" except under a condition, the reason for which had been clearly and distinctly stated. His acceptance to complete delivery, and

without which delivery could not be complete, awaited a condition precedent—the *acceptance* of the risk by the company itself, about which no doubt of authority could exist.

The terms used in the dealings between the respective agents admit no other rational construction.

And when the mutual action of the parties in the premises was had, so closely on the heels of the negotiation as to make it contemporaneous and coincident, the intent shown was precisely in accord with this plain common sense interpretation of the language they had used.

The actual text of the agreed case is plain and brief enough as a statement of the facts without the danger of epitomizing. (We refer to paragraphs 4, 5, 6 and 7 of the agreed case.)

The company had acted. Through its special agent, known by Tyler & R. to be the representative of the company, having authority to inspect, confirm or cancel risks for and on behalf of the company, on his first inspection visit to Washington, only ten days after the policies had gone into the hands of Tyler & R., they were informed that the Hartford "*refused to 'carry'* the risk"—*not refused to continue*, not *refused longer to carry*—and ordered the cancellation of the said policies.

Ordered whom? It was not the province of defendant to order Tyler & R., nor the province of Tyler & R. to cancel. It was the province of the agent who was subject to its order.

And on the same day, when Barrett, on his way to the office of Tyler & R., met the member of that firm who had exclusive charge of the matter, and informed him that the company ordered cancellation, Tyler responded, "all right, send up

and get them," all possibility of controversy or claim was ended, and they became in law as effectually ours, lying in Tyler's drawer, as if they had been manually given back.

The sickness of Barrett kept him from knowing that the papers were not in his office. He did not know that he had "*immediately*" ordered an entry of cancellation on his books, and the entry had been made immediately—so says the agreed case (par. 6); and Tyler had forgotten all about them.

And the next step in mutual action Three days thereafter, when the customary mutual accounts of business between the offices on the first of the month were settled, those accounts which would determine if premium was charged on the one hand and credited on the other—no charge appeared, nothing was asked for, nothing was proffered. The accounts were closed; the policies were treated as what they were—dead instruments. There was no charge and no proffer of premium to cover the ten intervening days, as must have been the case had the parties intended or understood that the risk was covered for those ten days. It would have been to the interest of both that premium should accrue, as their only compensation in commissions depended on the fact.

These acts of the parties leave no room for doubt that their intent was exactly what the plain meaning of the agreement shows upon its face.

UNLESS THEN IT IS NOT COMPETENT TO SHOW BY PAROL EVIDENCE that these papers went into Tyler & Rutherford's hands, subject to a precedent condition governing their delivery or acceptance as completed contracts, they never were contracts.

At the threshold of this question *it is worthy of*

grave consideration by this Court in what way this question properly belongs to this case. It would seem an anomaly to inquire if evidence of a condition precedent be admissible, *when the condition itself has already been distinctly admitted in the agreed case.*

Swatara R. R. vs. Brune, 6 Gill, 41.
Boden vs. St. Louis Mut. Life, 3 Mo. App., 248.
Pomeroy vs. St. Bank, 1 Wall, 592.
Burr vs. Des Moines R. R., 9 Wall, 99.

On objection a Court might rule that it was not admissible to prove that a condition of delivery or acceptance existed by agreement; but must not such condition govern when it stands admitted as a fact before the Court? If it must govern then this case is concluded. The intent of the parties is established beyond controversy. *It is too late to object to the mode of proof when the facts which establish the intent are admitted.*

We pass, however, to the discussion as if the facts were proffered in evidence instead of admitted as they incontrovertibly are.

The whole argument of counsel for plaintiff begs the question at issue and assumes that there was unconditional delivery, and when it states any matter as fact from the agreed cause remotely touching it, distinctly perverts and distorts the statement of the agreed case.

We hold and propose to establish on authority, THAT ANY INSTRUMENT IN WRITING, ALTHOUGH PASSED INTO *the hands of the party to whom it is to more by the party who makes it, must await the performance of a condition precedent either to*

delivery or acceptance before it becomes a contract, and failing the performance of the condition the paper is not binding, unless it be a negotiable instrument passed to a third and innocent holder; and WE HOLD ON AUTHORITY THAT THE INSTRUMENTS HERE INVOLVED FORM NO EXCEPTION.

The courts have drawn a sharp distinction between conditions which go to make up a contract itself, and conditions which determine if and when it becomes operative and effective between the parties to it. They do not permit parol evidence to vary its conditions when it is completed as a contract by absolute delivery and absolute acceptance. Both parties must then stand by its text, because parties have agreed to that text—the two minds have met—and that text expresses what they have agreed to be bound by. In other words, the Court will not permit parol evidence to show what is the contract when the writing defines it.

But the Courts do permit parol evidence to show that a paper, however complete in form, although placed in the hands of the party to whom it purports to move, is not delivered or accepted, if some precedent condition is attached to such delivery or acceptance, until the exacted condition is satisfied; and the Courts beyond dispute now hold that when such parol evidence is clear, and the conditions of delivery are not performed, the instrument is not a contract.

In support of this general proposition we need go no further than the case of Burke vs. Dulany, 163 U. S., 228, where the principle is broadly adopted that "THE MANUAL DELIVERY OF AN INSTRUMENT MAY ALWAYS BE PROVED TO BE ON A CONDITION WHICH HAS NOT BEEN FULFILLED IN ORDER TO AVOID ITS EFFECT."

A number of cases are cited and approved by the Court to which we beg to refer.

In that case, as in all cited in it, the contention was, that a different rule was "safer;" that "it prevents the uncertainty and the opportunity for controversy and imposition that would naturally follow from making the binding effect of a completely executed and delivered instrument of contract (if it be not begging the question to call that completely executed and delivered, the completeness of whose execution by reason of the character of delivery was the very point of discussion), depend upon verbal conditions of delivery;" and that "any inconvenience or hardship from its enforcement may be avoided by withholding the instrument until the suggested conditions or prerequisites were fulfilled." This reasoning did not prevent the application of the principle adopted by the Court to a negotiable note, absolutely unrestricted in its terms, and passed from the hands of the maker to that of the payee. The Court announced a principle; and when a case comes before this Court in which the conditions constituting the instrument before it are as clearly as possible separated from the conditions precedent attending its going into the hands of the party to whom it moves, which make delivery and acceptance merely manual, TO REFUSE TO APPLY THE PRINCIPLE IS TO OVERRULE THE COURT WHICH ANNOUNCED IT.

We affirm with absolute confidence that there is not one condition in the policies defining or restraining the powers of the agent, the obligations of the company, the rights or restraints upon the insured, or in any way touching the text of the instrument, which does not simply form part of the contract itself to operate only when, as in the case

of other instruments of contract, it is delivered or accepted; not one line or word to affect the rule laid down by the Supreme Court. All of the conditions go to the completion of the instrument, none to affect the attaching of the contract by delivery and acceptance.

In the negotiable note, to which the Supreme Court applied the principle, there is one phrase that does suggest an admission that the condition precedent which defeated it was fulfilled—the words "for value received." Here there is nothing like its equivalent.

The phrase "this policy is made and accepted subject to, etc.," gives no such suggestion. It applies and can apply only as a descriptive part of the instrument of contract a recital of what the contract is to be when delivered and accepted.

On this interpretion of the character of the restrictions and limitations of the power of the agent in a policy of insurance, we have the direct authority of the Court of Appeals of N. Y., expressed through Justice Peckham, in Harnickell *vs.* N. Y. Life, 111th N. Y.

Counsel have attempted to avoid the force of the decision and opinion of that Court, by refusing attention to the leading point of discussion and decision, and referring to a collateral and alternative ground stated in the opinion, and as to that part we think the meaning of the opinion has been misapplied.

The leading point of contention in that case was: whether conditions restraining the agent in the matter of premium payment brought home to the party to whom manual tradition was made, by a holding of the policies for months, before notice

to the company, did not preclude the suggested conditional delivery and acceptance.

What was the answer of the Court? It covers every suggestion here. It said: "The condition precedent to delivery and acceptance was not affected by the restrictions." It placed the doctrine of precedent condition on the authority of Benton *vs.* Martin alone, a case in which delivery alone was touched, and used this language, exactly applicable here:

> "THE PROVISIONS IN THE POLICIES, WHICH ARE ABOVE QUOTED, RELATE TO THE POLICIES THEMSELVES AFTER THEY SHOULD BECOME EXECUTED INSTRUMENTS BETWEEN THE PARTIES."

The explanation and comment, which followed are conclusive.

This was decisive of the case, and is authority. After deciding the case on this broad basis, the Court went on to show how, even if the case could not be determined on this broad ground, there was still another ground on which decision might rest, to wit: that even if the agent had no power under the restrictions of the policy to accept conditions precedent to the completion of the contract by delivery, Harnickell's power to impose conditions of acceptance was not restrained. And this branch of the decision is as forcible here as there, since Tyler & Rutherford's *acceptance* of the paper was upon the condition that the Company accepted the risk, and as the acceptance of the risk failed, the contract failed.

If by this high judicial authority this precise character of contract had not thus been brought

within the operation of the principle so luminously and broadly stated in Burke *vs.* Dulany, we are unable to see why a policy of insurance, as an "instrument of contract," should be excluded.

Especially would it seem equitable that such a principle should stand guard over transactions by agents of distant Companies. There is no class of instruments of contract which more frequently go into the hands of others completed as instruments, but not completed as contracts, because subject to conditions of complete delivery or acceptance. The multitude of conditions and restrictions of policies would seem to make this a necessity. It would be a great hardship, a most embarrassing condition, to impose on them the rule that mere manual tradition was completed delivery; quite as great a hardship as would be the correlative rule that mere manual possession was completed acceptance. A most instructive case in this point of view is Millville Mutual Ins. Co. *vs.* Collerd, N. J. C. E. 38th N. J., 480, which, in fact, covers almost if not the whole question.

The point involved is so luminously discussed in the dissenting opinion of Chief Justice Alvey (Record, p. 31), that we might confidently rest on that opinion alone.

Before passing from this branch of the discussion, we ask the further attention of the Court to the effect claimed by plaintiff of the phrase in the condition of delivery and acceptance, "and should be subject to immediate cancellation (the five days' notice in the policy conditions being waived) by notice that the Company rejected the risk."

We think we have irrefutably shown that the plaintiff's construction of this phrase is wholly unwarranted; that the intent attributed to the

parties is irreconcilable with the context, and inconsistent with the immediate action of the parties to the agreed condition.

We proceed to show THAT THE PLAINTIFF IS MISTAKEN IN THE CONSEQUENCES WHICH WOULD FOLLOW IF THE INTENT WAS WHAT THEY CLAIM. It would be a binding and effective condition if it left out entirely any requirement that the Company should accept the risk before it could become operative, and read: "Upon the condition that the same should be held by Tyler & Rutherford and not delivered to their principal until the decision of the Hartford Insurance Company comes, whether or not it would order the cancellation of the policies, and they be subject to immediate cancellation on notice of such order (the five-days' notice in the policy conditions being waived)."

1st. It will not be disputed that such an agreement, once established as such, would be obligatory on the plaintiff, if it were established as a condition precedent to the delivery of a paper, unless it conflicted with some distinct condition or clear implication of the contract itself, or unless all conditions are inadmissible.

Here the postulate is that it is an admitted fact, that the condition *was made and accepted.*

2d. There is nothing in the Policy itself to prevent the operation of such a parol waiver given as a condition precedent to its delivery.

The policy provides for its cessation as a contract at any time, at the instance of either the insured or the Company. The terms expressing this are: "This policy shall be cancelled at any time at the request of the insured; or by the Company, by giving five days' notice of such cancellation."

Both, by the terms of the paper, have a right to

stop the operation of the paper as a contract—the insured to do so immediately by a request, the Company by a notice which it is the right of the insured, under the policy, to have five days before it becomes effective—and under the authority of Grace *vs.* Ins. Co., 8 Ins. L. J., 95, in which the Sup. Court acquiesced, PAROL NOTICE is effective.

NOW IT IS NOWHERE A CONDITION IN THE POLICY THAT THE INSURED MAY NOT WAIVE ANY RIGHT SECURED HIM in the instrument; it is NOWHERE REQUIRED THAT ANY WAIVER BY THE INSURED SHALL BE WRITTEN UPON OR ATTACHED TO THE POLICY. The prohibition against waiver is that "no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto."

The only prohibition to the insured is—"nor shall any privilege or permission *affecting the insurance* under this policy exist or be claimed by the insured unless so written or attached." The right to assent to the immediate abandonment of the contract by notice is not a privilege or permission *affecting the insurance* under this policy. THE WAIVER WAS NOT A WAIVER BY ANY AGENT OR OFFICER, it was a waiver by the insured himself.

So there is nothing in the policy itself requiring that it be written on the paper to be effective.

When it is an agreed fact, not simply a proffer of evidence to prove as a fact, that the condition precedent to the paper going into the hands of Tyler & Rutherford was that it should be held by said Tyler & Rutherford subject to immediate cancellation by notice of an order of the Company to cancel, and that condition was accepted, we are unable to see why it should not be effective.

The policy not only provided for cancellation but for the abatement of premium and *pro rata* repayment. The sole effect of the condition, interpreted as it is by the plaintiff, would be an agreement for insurance, terminable on notice at a stated premium. Even if the parties intended what plaintiff claims, then Tyler & Rutherford would have placed insurance for one year terminable at the election of either party by notice, which the law allows to be by parol. That is precisely what this policy is, with the exception that the assured has the right in it to require five days' notice. It would be ridiculous to say that the power in Tyler & Rutherford to place insurance forbade them to take a policy terminable on notice without the right to five days' notice, and that would be the only result of such a waiver by them.

The only result then of the interpretation insisted on by plaintiff would be that he would owe us *pro rata* premium for the ten days before the notice of cancellation.

The interpretation of the plaintiff would not advance his contention a single step.

The clumsiness of the contrivance to produce such a result, however, is a conclusive proof that no such meaning could have been contemplated by the two parties to the condition as stated in the agreed case.

It is a notorious fact that the method of accomplishing such a purpose is by what is known as a "binding receipt," and if the fact is not of such common knowledge as to receive judicial cognizance, still the improbability of such clumsiness is pregnant proof that no such intent moved these parties.

As for the objection that our contention as to

the meaning of the condition would give us the opportunity of fraud on the insured by postponing decision for an indefinite time, but for respect for the learned counsel we would say it was frivolous. The necessary implication was that decision would be in a reasonable time. The decision was given in a reasonable time. *De minimis lex non curat.* The remedy for unreasonable delay was at all times in the hands of Tyler and Rutherford.

We pass to our second proposition:

THAT IF BINDING AT ANY TIME (WHICH WE THINK WE HAVE DEMONSTRATED THAT THEY NEVER WERE) THESE POLICIES BECAME VOID AND DEAD BY CANCELLATION IN ACCORDANCE WITH AN AGREEMENT NOT IN CONFLICT WITH ANY OF THEIR CONDITIONS AND ALSO IN ACCORDANCE WITH THEIR CONDITIONS HAD NO SUCH AGREEMENT EXISTED, NOTICE OF CANCELLATION HAVING BEEN PROPERLY GIVEN; AND THAT THEY WERE SO VOID AND DEAD BEFORE THE FIRE IN THE DECLARATION SET FORTH.

The policies provide that they may become void by notice of cancellation.

There is no question, as we understand, of the form of the notice given (Par. 4, p. 7, Transcript of Record); no question that it was complete and effective if it was given to the proper party; no question that, if given to the proper party, the policies became and were void and dead long before May 17, when the fire occurred.

As to this the terms of the policies themselves are too explicit and the authorities too distinct and equivocal for contention. Under an equivalent condition Judge Benedict declares:

"Neither the law nor the contract requires a written notice of cancellation. It was not necessary that the policy be returned to effect a cancelment of contract. By this contract the parties have agreed that a notice of cancelment shall put an end to it."

Grace *vs.* Insurance Company, 8 Insurance Law Journal, 96.

The Supreme Court of Pennsylvania say the same in South Side Insurance Co. *vs.* Mueller, 8 Ins. L. J., 260.

It is in fact the *concessum* of every case cited by plaintiff in error.

The only question at issue in this connection is: Was the notice to Tyler & Rutherford efficient? Were they the proper parties on whom to serve such notice, rather than on the plaintiff?

It would seem a sufficient answer to say that had notice been given to the plaintiff instead of to Tyler and Rutherford but one response was probable. "We know nothing of the policies. Tyler and Rutherford have made no report of progress to us."

Had such a notice been effective, Tyler & Rutherford would have held empty papers, and continued their work under a false and hazardous impression of what they had accomplished.

The plaintiffs say they were the only parties on whom the notice could be legally served. They admit as a fact that it was served on Tyler & Rutherford; admit as a fact that at the time it was served the existence of the policies was wholly unknown to them, and they were in the hands of Tyler & Rutherford; admit as a fact that they were so held by Tyler & Rutherford in compliance

with a condition, without the acceptance of which they would not have been issued and would not have gone into their hands at all—to wit: that they should be held and not delivered to their principals until the distant defendant could be advised of the risk and exercise a right of cancellation *reserved in the policy* if it disapproved the risk; admit as a fact that up to May the 16th some of the other agencies from which they held policies insisted on the same conditions as to cancellation as those fixed between said Barrett and said Tyler & Rutherford and that cancellations by orders of the different companies were so frequent that said Tyler & Rutherford could not before May 10th know how much binding insurance was on hand, and of necessary consequence, that said Tyler & Rutherford were up to that time still agents to *place insurance* for them and to fill as far as possible the desired amount; admit that premium arrangements concerning these policies were exclusively in the hands of Tyler & Rutherford, and premium settlements were to be in the mutual monthly accounts between Barrett and Tyler & Rutherford, and that after the notice, while Tyler & Rutherford were their agents in this regard, they had in settling the mutual account *settled* that no premium was due, and had in effect given up the policies although not manually returning them; and yet they say the policies were still alive and active contracts because the notice of cancellation was not given to them.

Their argument is that:

1st. The authorities are conclusive that an agent to procure insurance, although by the terms of the policy made the agent of the insured, is not an agent for the purpose of receiving notice of cancel-

lation—relying on Ins. Co. *vs.* Grace, 109 U. S., 298, and cognate cases.

2d. There is nothing in the agreed statement to warrant the conclusion that the brokers' agency or employment extended any farther than the procurement of the policies.

3d. "That when executed and delivered—*assuming that the delivery was unconditional and complete*—their agency ended."

4th. "That the broad rule is that notice must be given to the assured" (whether he knows or not of the existence of the policy), "and it would be inconsistent with the general principles of the law of agency, applied in Grace *vs.* Ins. Co., to hold that *because a policy is suffered to remain in the hands of the agent for its procurement he becomes the general agent of the insured, for that would be a necessary effect*, with power to alter, to rescind, and to accept notice of cancellation, and bind the assured without his knowledge or assent. To give such effect to the *mere possession* of the policy would be to *revive* a limited agency for no reasonable purpose. Moreover, it would be fraught with great dangers to the vast interests of insurance."

5th. That "merely *permitting the policies* to remain for a time and uncalled for in the hands of the brokers, *which is all that this record discloses*, is perfectly consistent with the idea of the termination of their agency."

6th. "With the receipt of the policy a new relation is created between the insured and the broker, that of depositor and depository; the possession of the broker became, in law, the possession of the insured, and nothing more; his sole duty is

to deliver the policy upon demand of the insured, or within a reasonable time without demand."

WE PROCEED TO SHOW THAT EACH AND ALL OF THESE PROPOSITIONS RESTS, TO PHRASE IT WITH ALL DUE RESPECT, UPON A MISTAKE—a mistake of the facts involved, of the law as stated, or of the application of the law as stated to the facts involved. We take them seriatim, at the hazard of tedious reiteration, commencing with the 2d as the 1st, will have discussion in another connection.

The 2d proposition is: "There is nothing in the agreed case to warrant the conclusion that the broker's agency or employment extended any further than the procurement of the policies."

Let us look at what the agreed case says and of necessity implies.

Its first paragraph is: Plaintiff "authorized the firm of Tylor & Rutherford, at their request, *to place insurance* for the company" (the plaintiff), "said Duncesson averring the amount to be placed to be the sum of $10,000, and Tyler & Rutherford averring a much larger sum."

Was this a simple agency or employment to procure the two policies of the defendant and to deliver them to the plaintiff when procured or keep them until called for? So as involved as a consequence plaintiff's 3d proposition, that when these two policies "were executed and delivered, *assuming* that the delivery was unconditional and complete, their agency ended?" Was nothing confided to them when authorized to place insurance for the company up to $10,000 except to go and get these two policies for $2,000? As the authority was *to place* insurance, and not simply to get a Policy of some named Company, it is not conceivable that if on reading any Policy sent them

the conditions were unsatisfactory, or if, on information, they doubted the authority of the agent to make it, they had no discretion to send it back and supply its place by satisfactory insurance, until they had placed the whole amount; it is not conceivable that because a Policy had come into their hands for $2,000 before they had completed their commission they must send to the plaintiff to get instructions about its retention. Their agency was continuous and their discretion full until they had completed their work, reported and placed the papers in the hands of the plaintiff, either actually or constructively.

Then, and not till then, could the policies be fairly said to be "*suffered*" to remain in the hands of the agent.

Then, and not till then, could the suggestion apply that "to give such effect to the *mere possession of the policy would be to revive a limited agency for no reasonable purpose.*"

It is undoubtedly true as stated in the 4th proposition that "it would be inconsistent with the general principles of the Law of Agency that because a policy is suffered to remain in the hands of the agent for its procurement he becomes the general agent of the insured, with power to "do all sorts of harmful and dangerous things including an acceptance of notice of cancellation." But the suggestion is not pertinent to the facts disclosed in the agreed case.

If they had placed the insurance they had placed it upon conditions.

The implication of authority in an agent is that he may do anything not violative of instructions, nor inconsistent with the purpose of his agency, nor the interest of his principal, which will ad-

vance the object of his agency. Here there were no instructions. Here Tyler & Rutherford distinctly announced, by unmistakable action, their authority to accept notice of cancellation; here that authority was not only directly consistent with the purpose of the agency, but distinctly in the interest of their principal, and distinctly advanced the object of their agency. Without such power their hands would have been tied, possibly to the serious damage of their principal.

In addition to this, the fact that premium payment was to be made in the mutual settlement of accounts between Barrett and Tyler & Rutherford would imply that while the policy was in their hands undelivered and unnotified to the plaintiff notice to them was proper, because not only notice but *pro rata return of premiums* are needed to complete the right to cancel May, Section 574). Return of *pro rata* premiums could not be made to plaintiff. It could only be to Tyler & Rutherford in adjusting their accounts. Must the two acts be separate? one moving to the plaintiff who could not complete the right, the other to Tyler & Rutherford, who could not recognize the fact of notice except from the plaintiff?

We see nothing in this case to distinguish the authority touching cancellation on April 27th, before they had completely placed the whole $10,000 from the authority exercised by the agent and approved by the Court in Standard Oil Co. vs. Triumph Ins. Company, 64th N. Y., 85.

Not only was this power consistent with the purpose of the agency until its whole object was attained, but Tyler & Rutherford had authority to make the specific engagement disclosed in the agreed case, which implied of necessity that the

notice should come to them. They had discretionary power to overcome the difficulty of *procuring the desired insurance* of which plaintiff was informed (Section 10 of agreed case). They had power to meet this difficulty, and *place the insurance* on any reasonable terms to fulfil the whole purpose and scope of their employment, by making an engagement that the instrument affecting it, without changing one line or letter or implication of it instrument, without impairing by a shadow of a shade the fact of insurance being placed and effective to secure the plaintiff up to every limitation of the instrument expressing it, should be so held that prompt effect might be given to notice of cancellation, which the Policy itself authorized, and they themselves if cancellation came might promptly perform the duty of placing insurance, not yet exhausted, and fill any gap, until they had reached the whole limit and ended their commission. They did so agree. They so agreed, not only in the interest of their principal because the insurance was refused and very properly refused unless they would so agree, but because it was a safeguard to their principal. If it had been so arranged that notice to their principal was necessary, the notice would have been effective, without their knowledge—their principal would have had to notify them of the gap in the insurance he desired—their unexhausted powers fill the deficit would have slept until they were so notified, and the interval might have brought disaster.

The terms were reasonable to exact, and reasonable to accept. The authority to make any reasonable terms not affecting the purpose for

which it was given, but consistent with it in all particulars, was of the clearest implication.

We pass to a brief consideration of the authorities cited in support of plaintiff's contention.

We think we might safely rely upon them in support of our own.

Of the whole array of citations, none but the cases, of which Grace *vs.* The American Central, 109 U. S., 278, and Hermann *vs.* Niagara, 100 N. Y., 411, are the most conspicuous and complete, have anything but a purely academic interest.

These cases, when analyzed, distinctly support our contention. They decide that the broker, employed simply to secure insurance, when he has done so, and has *delivered the policy up to his principal*, has no further relation to it, and that his principal is not chargeable with notice of cancellation *thereafter given* to the broker, which does not reach him before the loss, notwithstanding a custom among insurance men of giving such notices to the broker, and that the Court below misinterpreted a clause in the policy which it supposed made said broker the proper party to such notice.

This is all they decide.

In all these cases the policy had been deliberately turned over to the principal *before the notice*, and the very basis of the opinion of the Court, in all of them, was that only on such delivery the broker's agency in relation to the policy ceased.

The necessary implication is that *up to that time it had not ceased*, and up to that time notice of cancellation to the broker would have been efficient. In the language of Benedict, J., "would have put an end to the policy."

In the Grace case Judge Harlan says:

> "At the trial it was admitted that the contract between the parties was fully executed *upon the delivery of the policy to the insured* and when the contract was consummated by the *delivery of the policy*, he ceased to be the agent of the insured, if his employment was limited solely to procure the insurance."

The policy had been procured by the broker September 26, and was by him delivered to Grace & Co. September 27. The agent of the insurance company gave notice of cancellation to said broker October 6, and the property was burned October 7, before Grace & Co. ever heard of the notice.

In the Hermann Case, 100 N. Y., 411, Judge Andrews, after stating that "the authority of the agent terminates with the procurement of the policy," adds:

> "It cannot in reason be held to continue after the insurance has been procured and the policy delivered to the principal.
>
> "The defendant's agent knew that Kennedy & Buel (the procuring brokers), had sent the policy to the plaintiff in New York, and it was then in his possession. Plaintiff had no knowledge of the transaction in respect to cancellation until after the fire."

The stress of the opinion is the same as in the Grace case.

In fact, it was the predicate of plaintiff's counsel. "Such agency," he says,

> "of Kennedy & Buel existed in reference to the policy in suit was one that the law implies from the receipt and retention of the policy

then procured, and it naturally would and did terminate *when the policy had been delivered to the plaintiff* and the premium paid by him. *The possession of the policy was sufficient evidence of his authority to cancel or modify it.*"

We repeat: In both of these cases, as in all of the cases to which plaintiff has referred or can refer, the policy was a live, active, accepted contract when it went into the hands of the insured. It had been accepted without qualification by the procuring broker and by him delivered into the hands of his principal. No cancellation had been ordered or notice given to the broker until after that event, and no notice had ever reached the assured thus holding his policy. The relation of the broker to it had absolutely ceased. He could no longer have negotiated modification of its terms, or returned it for any cause, without its recommitment to him by the assured. Notice to him was notice to a stranger, and was, therefore, no notice.

Such, and such only, were the facts and effect of these decisions.

The circumstances here widely differ. Tyler & Rutherford, authorized by the assured to place their insurance (agreed case, par. 1, p. 6, of Transcript), had procured two policies under the conditions described in paragraph 2, page 7, of Transcript, as follows: Barrett, the agent for defendant, stated to said Tyler & Rutherford that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal, but that he would issue policies upon the condition that they should be held by said Tyler & Rutherford and not delivered to their

principal until the decision of the Hartford Fire Insurance Company on the acceptance or rejection of the risk was duly had, and should be subject to immediate cancellation, by notice that the company rejected the risk. The condition was accepted, and the policies went into their hands.

During the entire period between the employment of Tyler & Rutherford and the accidental falling of these papers into the hands of plaintiff, there seems to have been but one inquiry by Duncanson, manager for the insured, about the state of the insurance. According to him the only information given was that there was great difficulty in procuring the desired insurance, but, according to Tyler & Rutherford, he was informed that it was impossible to say what binding insurance they had, as some of the agencies insisted on the same conditions as those fixed between them and Agent Barrett, and cancellations were so frequent that they could not tell what was in force, no specific mention being made of defendant's policies (paragraph 10, page 8 of Transcript). There is no dispute that Tyler's statements are facts. The only doubtful point is the unimportant one, whether more was communicated to Duncanson than what he states.

Everything was left to the discretion and management of Tyler & Rutherford. They held the papers in good faith to both plaintiff and defendant.

They accepted the notice of cancellation, and doubtless did their best, as it was their interest to do, under their discretionary powers to fill the gap created. All this was some weeks before the policies were ever heard of by plaintiff, and that only

when they fell by accident into his hands (paragraphs 9 and 11, page 8 of Transcript).

Plaintiff might quite as reasonably claim on them, if, after they had been made and recognized, as dead, they had been lost in transmission from Tyler's office to Barrett's and picked up in the street.

Before closing this paper, for the length of which we proffer the excuse that it seemed necessary to thorough examination of the questions involved, we ask the Court to test the theory of the plaintiff on a reversal of the position of the parties, on the hypothesis that we were seeking to recover premiums for these Policies, if they had never found their way by accident into plaintiff's hands, had been sent back on April 27th, or had stayed in Tyler's drawer, and been found and returned to us by Tyler after the year was out, and there had been no fire.

By the theory the plaintiff asks this Court to adopt, the Policies would have covered plaintiff's interest and been earning premium of necessity all the time. The premium was earned and must be paid. The plea would be in vain that "your Policy was never heard of." "I charged my agent with authority to place insurance, not to get me your policy. The paper passed into his hands on condition, both of delivery and acceptance, that it should not come into my hands until the expressed doubt of authority to issue it was removed by the action of the company; the adverse action of the company had promptly come while my agent still had power to place the insurance elsewhere, and he did or tried to fill the gap. He, in fact, practically gave up the Policies, and both

parties settled their mutaal accounts with the agreement that no premium was due."

This plea would fall before the replication: "That no condition precedent can effect the delivery of a policy of insurance. That no agreed condition could have effect in any way after the Policy went into the agent's hand, because that was complete delivery and acceptance, and ended his agency, after which it stood in his custody only as if left in his care by the insured."

The inexorable result would be that the premium must be paid. Nor would this result be changed if the Policy had been returned to the company. In its hands by such a tenure its return would be a futile act.

How this theory would affect the vasts interests of Insurance is not difficult to see. Millions of Policies have been passed into the hands of agents authorized to place insurance, been returned to the companies in the exercise of a wise discretion, without report to their employers, and replaced by more satisfactory papers. If a speculative idea of injurious consequences have any proper bearing upon the principles determinable by a Court, we affirm with confidence that those the plaintiff asks this Court to adopt would lead to almost incalculable injury and wrong.

The judgment of the Court of Appeals reversing the judgment of the Supreme Court of the District of Columbia should be vacated and the judgment of the Supreme Court should be affirmed, with costs.

SAML. B. PAUL,
Of Counsel.

ALEXANDER WOLF,
Attorney for Defendant.

19

No. 625

Brf. of Blair for Respondent

Supreme Court, U.S.
FILED
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JAMES H. MCKENNEY,
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Filed April 8, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 625

THE HARTFORD FIRE INSURANCE COMPANY, Petitioner,

vs.

ALBERT A. WILSON AND JOHN B. LARNER,
Trustees, Respondents.

Brief on Behalf of Respondents to Petition for a writ of Certiorari to the Court of Appeals of the District of Columbia.

HENRY P. BLAIR,
Counsel for Respondent.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No.

THE HARTFORD FIRE INSURANCE COMPANY, Petitioner,

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Brief on Behalf of Respondents to Petition for a writ of Certiorari to the Court of Appeals of the District of Columbia.

ARGUMENT.

This is a petition for a writ of certiorari to the Court of Appeals of the District of Columbia to bring here a case involving two insurance policies of one thousand dollars each, which case has already been twice argued before the Court of Appeals, as well as having been originally heard by the trial justice of the Supreme Court of the District of Columbia.

Concerning the granting of this writ this Court has said in Forsyth *vs.* Hammond, 166 U. S., 506, 514:

"And further, that while this power is coextensive "with all possible necessities and sufficient to secure to "this court a final control over the litigation in all the "courts of appeal, it is a power which will be *sparingly* "exercised, and only when the circumstances of the case "satisfy us that the importance of the question involved, "the necessity of avoiding conflict between two or more "courts of appeal, or between courts of appeal and the "courts of a State, or some matter affecting the interests "of this nation in its internal or external relations, de- "mands such exercise."

The only ground upon which petitioner can attempt to stand in this Court is "importance of the question involved." It would hardly seem that this proposition could be seriously urged. The amount is admitted to be unimportant and the argument is made as to the far reaching effects of the decision. This is magnified and the decision itself twisted by the specious argument of the learned counsel. The effect of the decision of the Court of Appeals is to hold that when an insurance company *issues* a policy and *carries* a risk which requires *cancellation* and *waiver of conditions in that policy as to cancellation* in order to stop the *running of the risk*, then a policy has been issued and, subject to its terms it becomes a valid, subsisting obligation. They hold that the insurance company cannot issue a policy for the definite *term* of one year and by parol modify the conditions of that policy unless they endorse the modifications thereon in accordance with the provisions of the policy itself. It was admitted that this policy was operative from its date for ten days at least and that had a fire occurred during that period, the company would have been bound to pay the loss. It is also admitted that the risk takes effect as of the date of the policy, if it is ever in force.

The decision of the Court of Appeals merely holds that you cannot a deliver valid, subsisting risk, which takes effect at the time of delivery, and then, although the risk is effective and the policy admittedly *in force*, attach conditions to *that*

delivery in a manner contrary to the provisions of the *admittedly existing contract*.

Counsel do not wish to weary the Court with a discussion of the case but respectfully submit herewith the briefs used at the two hearings below with the suggestion that the importance and magnitude of this case only occurred to petitioner's counsel when the Court's decisions were contrary to their contentions. This case has twice been patiently heard by the Court of Appeals, and although the learned chief justice has dissented, yet a majority opinion has twice sustained the contention of this respondent that upon the agreed facts in this case a *valid, subsisting contract was delivered*, which could only be modified by its own terms and conditions, which admittedly was not done in this case.

There is certainly nothing in such a holding in conflict with any decision of this Court or with any possible contention or view of the law. Neither Burke *vs.* Dulany, 153 U. S., 228, nor Hanickell *vs.* New York Life Ins. Co., 111 N. Y., 399, hold the contrary of this proposition.

The Court of Apppeals says (page 25 of the petition herein):

> "From the terms of the agreed statement, it appears "that the local agent of the insurer, who was possessed "of signed policies and authorized to fill the blanks, de- "liver them, and bind his principal thereby, *regarded* "*the polices in force*, at least, until disapproved by the "company, *and therefore subject to the reserved power of* "*cancellation*, notwithstanding the conditional delivery, "hereafter to be considered separately."

In this is applied the principle that the risk having *taken effect*, took *effect* subject to the provisions and conditions of the contract and that modifications of a *subsisting* written contract cannot be shown by parol, contrary to the written provisions of that contract. The learned chief justice denies

the *existence* of the contract and his opinion is founded on that proposition, which it is respectfully submitted is contrary to the opinion of the majority of the Court of Appeals and to the reasonable and proper construction to be given to the agreed case.

There appears to be no error in the decision of the Court below nor does there appear to be any question of magnitude involved in the case. The writ should be denied.

Respectfully submitted.

HENRY P. BLAIR,

Counsel for Respondent.

BRIEF ON ORIGINAL HEARING.

IN THE

Court of Appeals of the District of Columbia.

January Term, 1900.

No. 959.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Appellants,

vs.

THE HARTFORD FIRE INSURANCE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

STATEMENT OF THE CASE.

In April, 1895, the Ivy City Brick Company, through its Treasurer, authorized Tyler & Rutherford, Real Estate and Insurance Brokers in the City of Washington, to place insurance on the plant of the Company situated at Ivy City, D. C., to the amount of $10,000. Thomas F. Barrett, the agent of the Hartford Fire Insurance Company, the appellee herein, wrote the two policies involved in this suit and delivered them to Tyler & Rutherford. According to the agreed case at the time of this delivery Barrett required that Tyler & Rutherford should hold the policies and not deliver them to their principal, as his authority to write the risk was doubted by him, and that the policy should be held subject to immediate cancellation, the condition in the policy providing for five days' notice being waived These policies bear date April 17, 1895, which was the date of

the transaction between the parties, and under their terms the loss, if any, was payable to Albert A. Wilson and John B. Larner, Trustees, as interest might appear, said Wilson and Larner, the plaintiffs below and the appellants here, being trustees under a Deed of Trust from the Ivy City Brick Company to secure a loan on the property of the said corporation.

On the 27th of April a special agent of the appellee, for the first time since the writing of the risk, visited Washington on an inspection trip and refused the risk and ordered the cancellation of the policies, giving this information to a member of the firm of Tyler & Rutherford who directed him to send to the office and get the policies. Various trips were made for the same but the policies were not obtained from Tyler & Rutherford. An entry was made on the books of the Hartford Fire Insurance Company kept by Barrett to the effect that the policies were canceled by order of the Company (R., p. 7), and as between Tyler & Rutherford and Barrett in a subsequent settlement of accounts these policies were not considered. All these facts were unknown to the insured or the appellants until after the fire occurred. On the 16th of May, Tyler & Rutherford delivered to the Treasurer of the Company policies to the amount of $10,000, including among the same the two policies involved in this suit (R., p. 8), and rendered a bill for the same in which a charge was made for the premiums on these two policies (R., p. 10). At the time the policies were delivered and the bill rendered, the Treasurer of the insured agreed to pay the account as rendered on May 27th following (R., p. 8).

About one o'clock on the morning of May 17th the fire occurred, and subsequently, during the morning of that day, Tyler & Rutherford demanded the return of these policies which was refused under instructions from the insured, and, no settlement being reached, suit was eventually instituted.

It is agreed that the loss was total and any irregularities or laches as to proceedings subsequent to the fire are waived and it is further agreed that if the appellants are entitled to recover,

they are entitled to the face value of the policies with interest from the 7th of October, 1895, and costs. (R , p. 9.)

The case was argued and submitted to the Court below on the agreed statement of facts and the Court found for the defendant for costs in accordance with said agreed case. Exceptions were duly reserved to that judgment and an appeal taken to this Court.

Assignment of Errors.

1. The Court below erred in giving judgment for the appellee on the agreed case filed herein.

2. The Court below erred in not giving judgment for the appellants.

Argument.

Barrett was the general agent of the Company at the Washington, D. C., office whose signature was necessary to every policy issued by that office. When the policies in suit were countersigned by Barrett and delivered to Tyler & Rutherford they became *existing* policies. The agreed case does not deny the authority of Barrett to issue these policies and it does not appear (nor was it the fact) that he was without such authority. We have therefore on April 17, 1895, two valid policies in the hands of Tyler & Rutherford, the *agents to procure insurance* for the Ivy City Brick Company.

The contention is made that the delivery to Tyler & Rutherford was *conditional* and that there was a waiver by them of the provision for five days' notice of cancellation contained in the policy. The argument that a provision of the policy was to be waived involves the admission that the policy containing the provision was in force, for there could be no waiver of a provision not in force; nor could there be *conditional* delivery of a policy actually in force and subject to *cancellation*. It further appears from the agreed case that the *special agent* of the insurer on his first inspection visit to Washington after the writ-

ing of this risk *ordered its cancellation*. This was verbal and there is no written evidence of any part of this transaction, either at the time the policies were delivered or subsequently, *except the policies themselves*. The final paragraph of the policy provides among other things:

> "This policy is made and accepted subject to the fore-
> "going stipulations and conditions, together with such
> "other provisions, agreements, or conditions as may be in-
> "dorsed hereon or added hereto."

The Company has required that any *other* provisions, agreements, or conditions be indorsed on the policy or added thereto. The policy is theirs and the language of a written instrument is to be taken most strongly against the party preparing the same.

The policy also contains the following provision:

> "This policy shall be canceled at any time at the request
> "of the insured; or by the Company by giving five days'
> "notice of such cancellation."

By the terms of the insurer's policy the risk was made and accepted subject to *this* stipulation and there was no other provision altering the same indorsed on the policy or added thereto. It was in full force.

The date of the policy was April 17, and the attempted cancellation was April 27. It is not to be doubted but that the Company would have been liable, had the loss occurred within that period. The delivery was not a *conditional* one, therefore, for the language of the policy would require such condition to be indorsed thereon or added thereto. It was in force, for an order of cancellation was made by the special agent of the Company and the bill of Tyler & Rutherford (R., p. 10) charges the premium from April 17.

An attempt to cancel involves the admission of the *existence* of the policy.

Aetna Insurance Co., *vs.* Maguire, 51 Ill., 342, 347.

If this policy was not in force why should it be *dated* April 17th and be *canceled* April 27th? Was it *conditioned* on the acceptance of the risk by the special agent, with the understanding that, if accepted, it should date *back* to the day of the alleged *conditional* delivery and the insured should pay premium for the time intervening between the date of the policy (which was the date of the alleged conditional delivery) and the date of approval of the risk, although during all that period, according to the present contention of the insurer, no liability attached under the policy because of the terms of the *verbal* contract between Barrett and Tyler & Rutherford. It is true that this time was only ten days in the present case. It might have been much longer. Had the special agent approved the risk at the end of such period the insurer's policy would then be made to cover a period during which (if the delivery were conditional) there had been no liability on the insurer, and the insured would pay premium for time not covered by the risk. Surely, neither Barrett nor Tyler & Rutherford were parties to any such fraud on the insured, and the only reasonable deduction from the circumstances attending the issuing of the policies is that the risk attached on April 17, 1895, the *written* date *in the policies* from which the insurer agreed to insure for *the term of one year* to the 17th day of April, 1896, at noon.

The authorities are conclusive that an agent *to procure* insurance, although by the terms of the policy made the agent of the insured, is not an agent for the purpose of receiving notice of cancellation.

Ins. Co. *vs.* Grave, 109 U. S., 278.
Hermann *vs.* Ins. Co., 100 N. Y., 411.
Assurance Society *vs.* Ins. Co., 84 Va., 116.
Assurance Co. *vs.* Cooper, 40 Pac. Rep., 147.
Mills Co. *vs.* Ins. Co., 125 Mass., 110.

An agreement to cancel does not affect the original contract.

Ins. Co. *vs.* Webster, 6 Wall., 129.

In that case the contract of insurance was executed and delivered. Afterwards a memorandum was signed by the assured to the effect that the insurance on the application was to take effect when approved by the general agent of the Company. He refused the risk and directed his agent to return the premium note and cancel the policy, of which facts the assured was not informed until after a loss occured. When the premuim note was tendered him he refused to receive it, and in an action on the policy the party insured was held entitled to recover for the loss, the agent having neither returned the note nor canceled the policy.

So, too, in the case at bar the contract of insurance was executed and delivered, for the delivery to Tyler & Rutherford of an *existing* policy was delivery to the insured. At the time of the fire the policies were in the possession of the insured, and not until *after* the fire did it have any knowledge of the *verbal* agreement between Barrett and Tyler & Rutherford. The insured never *signed* any memorandum. If the *written memorandum* in one case did not save the insurer from paying its losses, why should such force and effect be given in the present case to a *verbal agreement to which the insured was not a party.*

Under the terms of the policy notice of cancellation should have been given to the insured on the authority of the cases already cited and the following additional cases.

Ins. Co. *vs.* Raden, 87 Ala., 311.
Ins. Co. *vs.* Turnbull, 86 Ky., 230.
Ins. Co. *vs.* Nill, 114 Pa. St., 248.
White *vs.* Ins. Co., 120 Mass., 330.
Rothschild *vs.* Ins. Co., 74 Mo., 41.
Broadwater *vs.* Ins. Co., 34 Minn., 465.
Kehler *vs.* Ins. Co., 23 Fed. Rep., 709.
Adams *vs.* Ins. Co., 17 Fed. Rep., 630.

Two adjudged cases approach very closely to the case at bar and support the contention of the appellants in each instance.

In Assurance Company *vs.* Cooper, 40 Pac. Rep., 147, 149, agents represented insured and company. They were directed several days before the fire to cancel a policy of the insured in their possession. They served this notice on themselves and *canceled the policy*. The clause as to cancellation is similar to the one in the present case. Held, that they were not agents for the purpose of cancellation notice although they had possession of the policy in question.

In Mills Company *vs.* Insurance Company, 125 Mass., 110, plaintiff by treasurer applied to A who applied to B, of the firm of B & C, who could place risks in R. Co. and bind W. Co. B talked with C and placed risk in R. Co. and notified R. Co. November 1 of risk. November 2, six p. m., R. Co. notified B & C that the risk was declined and B, without notifying plaintiff, bound W. Co. Loss occurred between 11 and 12, night of November 2. In morning B went to his clerk and told him R. Co. had declined risk and instructed clerk to report risk to W. Co. B & C were both away that day and at time of conversation with clerk B was ignorant of fire. November 2 A went into office of B & C and reported fire and that policies were wanted and asked if policy was written for him. Clerk said, Yes, in R. Co , which had declined to take it and it was to be placed in W. Co., and asked A what to do. R. Co. policy was delivered to A who turned it over to plaintiff. Afterwards B & C tried to get plaintiff and A to return policy but they refused. R. Co. held liable.

The risk attached and the company were held liable because the *terms of the policy* were not observed in the *cancellation* of the risk, although policy was not *delivered* until *after* the fire. In the present case the risk attached and the company have never complied with the *terms of the policy* as to *cancellation* and the policy was delivered *before* the fire.

Notice to third parties to whom loss is made payable by the terms of the policy is necessary as well as notice to the assured.

Latin *vs.* Ins. Co., 45 N. J. Law, 453.

Where cancellation is ordered by the company and, through failure on the agent's part, it is not properly made, liability arises on the part of the agent to the company for such failure.

Franklin Ins. Co. *vs.* Sears, 21 Fed. Rep., 290.

It is, therefore, respectfully submitted that, on the agreed case and the authorities cited herein in support of the contention of the appellants, on April 17, 1895, the two policies delivered to Tyler & Rutherford became existing contracts of insurance subject to the terms and provisions contained in the policies, which terms and conditions were those prescribed by the insurer and which, therefore, are to be taken most strongly against it, and through failure on the part of the Company to comply with the terms of its own policy the insurer rather than the insured should suffer. Since the risk attached and the policies were operative, the insured was entitled to the five days' notice of cancellation which has never been received by it, nor have the assignees of the insured ever been notified of the cancellation of the policies. The policies being in force at the time of the fire it is respectfully submitted that there was error in the judgment of the Court below, which judgment should be here reversed and the case remanded, with instructions to enter judgment for the appellants in accordance with the stipulations of the agreed case.

The remedy of the insurer is properly by suit against its agent for failure to obey the instructions given him, and it is not equity that the insured should be deprived of the benefit of their policies because of the failure on the part of the insurer's agent to comply with the contract issued by him under his authority from the Company.

HENRY P. BLAIR,
CORCORAN THOM,
Attorneys for Appellants.

BRIEF ON RE-HEARING.

IN THE

Court of Appeals of the District of Columbia.

JANUARY TERM, 1901.

No. 959.

ALBERT A. WILSON and JOHN B. LARNER, Trustees,
Appellants,

vs.

THE HARTFORD FIRE INSURANCE COMPANY.

The motion for re-hearing in this case was based on two grounds: (1) that the point raised by the majority of the Court against the appellee was not argued at the hearing of the cause and is directly contrary to the contention of both the appellant and appellee, and (2) the illness of counsel. In presenting the argument for re-hearing, the counsel for the appellants desire to place on record the fact that the motion for re-hearing was unopposed because of the second reason advanced and not because of assent to any of the propositions advanced in connection with the first reason assigned and it seems only fair to us to add that the argument of the cause at the former hearing was proceeded with at the suggestion and insistence of the appellee's counsel who at that time engaged to take not over ten minutes of the time of this Court.

Counsel must decidedly dissent from the proposition that this case has been decided in this Court contrary to the contentions of the appellant. The proposition of the appellant

from the beginning has been that this was a valid subsisting contract, subject to the terms and conditions contained within the four corners of the paper, among which terms and conditions in the instrument prepared by the insurance company, and therefore to be taken most strongly against the appellee, occurs the clause, "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto." Such being the contract, it does not lie within the power of the party preparing the paper and by the countersigning of its agent issuing the same to vary or alter the terms and conditions of its own policy. There is not an adjudged case among all those cited or referred to by the distinguished counsel for the appellee which holds that there may be a delivery of a contract contrary to the provisions of that contract, and, with the indulgence of the Court, counsel will briefly discuss the case of Burke *vs.* Dulaney, 153 U. S., 228 and the cases cited therein, because it is the construction of this Court upon this case which is now advanced as error by the appellee on the motion for re-hearing.

Burke *vs.* Dulaney is a contention between the original parties to a promissory note and the note itself, of course, contains no clause requiring modification of its terms to be endorsed thereon or added thereto, yet the Court here holds that no agreement between the original parties could have been shown to the prejudice of an innocent holder for value.

In Ware *vs.* Allen, 128 U. S., 590, cited in Burke *vs.* Dulaney above, the Court held that the contract never went into effect, but so to hold in the case now before this Court would be to hold that the parties were without their insurance from the 17th of April to the 27th of April, and that all the action by Royce and Barrett with reference to cancellation was unnecessary, because if the policies sued on never went into effect there could be no occasion for either Royce

or Barrett doing anything in regard to them after their delivery to the agents to procure insurance.

In Pym *vs.* Campbell, 6 El. & Bl., 370, which is reviewed in Burke *vs.* Dulaney, it appears that the agreement between the plaintiff and defendant was subject to the approval of two engineers employed by the defendant before the same became operative, and that only one of the engineers ever gave his approval. It also shows that it was a matter of convenience in having the parties sign at different times in the absence of the two engineers, and that the signature of the defendant was distinctly given subject to the approval of the absent engineer who never did approve. This is a different case, as, in fact, are all the cases, where there is no clause requiring modification of the contract to be endorsed thereon or added thereto.

Wilson *vs.* Powers, 131 Mass., 539, also reviewed in Burke *vs.* Dulaney, was a suit on a promissory note which, of course, did not contain the clause relative to modification by endorsement thereon or addition thereto.

Benton *vs.* Martin, 52 N. Y., 570, and the other cases cited in Burke *vs.* Dulaney, all involve written instruments which do not contain the clause so frequently referred to and it is confidently asserted that in no instance has the rule been extended so far as to admit evidence to contradict the terms of a written agreement when the agreement itself specifically provides the only way in which any of its conditions may be altered or modified.

To hold in this case that there never was a valid subsisting contract is to hold that the signature of Barrett was ineffective to accomplish the stipulation of the policies to the effect that the countersigning by the agent made a valid and binding obligation. It is further to hold that the recital in the policy that in consideration of a premium the company did insure for the term of one year from the 17th of April is not a correct recital and is not valid It is fur-

ther to hold that this instrument prepared by the insurance company can be altered or modified or changed by conditions not endorsed thereon or added thereto. As counsel have previously intimated, we do not see what occasion there was for the special agent to refuse to carry a risk and reject it on behalf of his company and order the cancellation of policies which, according to the present contention of the appellee, never were in existence. The very language itself shows that there was but one construction in the minds of these parties at the time Barrett wrote these policies within his authority and that construction was to issue valid subsisting risks, but that this action was accompanied by an attempt to alter or change the conditions of the contract in a manner opposed to the terms and stipulations of the same. It is elemental law that this could not have been done.

The language of the Agreed Case on the question of the delivery of the policies is that the insurance company's agent stated that "he would *issue* policies amounting to $2,000, equally divided on the buildings and machinery, upon the condition that the same should be held by the said Tyler & Rutherford, and not delivered to their principals until the decision of the Hartford Fire Insurance Company on the acceptance of the risk was duly had, and should be subject to *immediate cancellation* (the five days' notice in the policy conditions *being waived*) by notice that said company *rejected* the risk;" and in paragraph 4 of the Agreed Case the special agent of the Hartford "went to the office of said Tyler & Rutherford and informed them that the Hartford Fire Insurance Company refused to *carry* the risk, and ordered the *cancellation* of the said policies;" and in paragraph 6 of the Agreed Case recites that the company's local agent "immediately ordered the entry clerk to make the *customary* entry in such cases on the register where the policies were noted, 'canceled by order of the company,' which was ac-

cordingly done" (Record, page 7), and of all these facts the insured had no knowledge. If the contention that these policies *never were in force* be correct, it is for counsel to explain why the condition for *immediate cancellation* and *waiver* of five days' notice should be attached to the delivery of policies which did not exist.

This Court has held in its decision in this case and the motion for re-hearing has not questioned the accuracy of that decision in this respect, that there is nothing in the Agreed Case to warrant the conclusion that the broker's agency or employment extended any farther than the procurement of the policies, and that their agency and employment ended when the policies were executed and delivered, unless that delivery were conditioned and incomplete. This is decided on the authority of Grace *vs.* Insurance Co., 109 U. S., 278, and is held to be the law on the ground that it would be inconsistent with the general principles of the law of agency to hold that in case the policy remained in the hands of the agent after its procurement he thereby becomes a general agent of the insured, and this Court states the law that upon the receipt of the policy, the relation of depositor and depositary arises between the broker and his principal and the agency to procure insurance ceases.

It is conceded by the appellees that there never was notice to the insured of the cancellation of this policy. The learned counsel was asked before the trial judge below and has been asked again in this Court whether the company would have been liable if a fire had occurred between the 17th of April and the 27th of April; the 17th of April being the date contained in the policy from which the company insured for the period of one year, and the 27th being the date on which the alleged cancellation took place. It seems a fact not to be disputed that if a fire had occurred at any time during this period the liability of the company would have been beyond question, but to concede this fact is to admit the

delivery and existence of these policies and if valid, by the Agreed Case, the insured have never been notified of its cancellation, and therefore the obligation is still binding. To avoid this conclusion the counsel advanced the theory that there was no valid policy in this case and that the insurance never was effected. The more than sufficient reply to this contention is that had the special agent, on the 27th of April, agreed to *carry* the risk and not ordered its *cancellation*, in accordance with the theory of the appellee, the liability would, on that date, have attached for the first time and, although the premium was charged for a full year from the 17th, yet the policy was ineffective for a portion of that time and there was fraud upon the insured. It is true that under the particular facts in this case that time would have been only ten days but the visit of the special agent might have been deferred for three or even six months and yet, if the contention of the appellee be correct, the company could have collected a premium covering insurance for the period from the 17th of April although the policy was not in force until the agent's visit might occur, six months or more after the date of the policy. There is not an expression used in the Agreed Case or in the correspondence attached thereto which does not clearly contemplate the existence of a valid policy and the Court should be mindful of the fact that all the correspondence in this case occurred before the issues were clearly defined and while the transactions were still fresh in the mind of all parties thereto.

None of the cases cited by counsel on the question of conditional delivery of a parol contract involve a condition which is contradictory of the terms of that contract. Here it is sought to make a delivery on a condition contrary to the terms of the contract. For the contract says *insurance for the term of one year from the 17th of April, 1895*, while the entire argument of the appellee says insurance for such time from April 17, 1895, to April 17, 1896, as our special agent may

allow, but *on payment of a year's premium anyhow*. The policy says the *term* of one year in consideration of a year's premium. The contention says any time the insurer chooses, not to exceed a year for a year's premium.

The cases cited allow the introduction of parol evidence to show the non-existence of contracts not under seal, although executed, but specifically hold that the evidence cannot be admitted to contradict the terms of the contract, only to show there never was a contract. There is an argument from equity, convenience, or necessity in all the cases which has led to the conditions in each instance. Here no such facts exist. These brokers were within a square and a half of each other and in constant communication. Barrett had the authority to write these policies. When Barrett countersigned a policy, it became the obligation of the company. the policies were treated like all others issued by him on the books of the office The special agent regarded the contracts as valid, and treated them as such. All the correspondence between the parties at the time of the occurrence refers to these policies in language applicable only to valid subsisting contracts which with the other facts cited proves that Barrett wrote these policies from April 17th and then, when delivering them, attempted to alter their conditions in a way expressly provided against by the terms and conditions of his own contracts. The leading insurance case cited by the appellee, which they offered as conclusive of this case before the learned justice in the Circuit Court, is the Hainickell case, 111 N. Y., 390, and this Court has disposed of that case by emphasizing that the agreement is fully expressed in writing and *signed by both parties*.

As this Court has said in its opinion it is the nature and terms of the policies themselves which interferes with the grafting of the conditions in the manner contended for by the appellee. Delivery here to the agent to procure was delivery to the principal and by the very nature and terms

of the insurer's own contract that delivery could not be modified or controlled by parol agreements. Counsel further submit that the Agreed Case does not warrant the finding of a "conditional" delivery on the facts set forth and that the decision already rendered in this case is a correct statement of the law applicable to these facts and should not be altered.

HENRY P. BLAIR,
CORCORAN THOM,
Attorneys for Appellants.

Office Supreme Court U. S.
FILED
NOV 6 1902
JAMES H. McKENNEY,
Clerk.

No. 79.
Brf. of Blair for Respondents.
Filed Nov. 6, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 79.

THE HARTFORD FIRE INSURANCE COMPANY, *Petitioner*,

vs.

ALBERT A. WILSON AND JOHN B. LARNER, *Respondents*.

Brief for Respondents.

HENRY P. BLAIR,
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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 79.

THE HARTFORD FIRE INSURANCE COMPANY, *Petitioner*,

vs.

ALBERT A. WILSON AND JOHN B. LARNER, *Respondents.*

Brief for Respondents.

The point at issue in this case arises over two insurance policies in the possession of the assured at the time the loss occurred, payment whereof was refused by the insurance company on its interpretation of the effect of certain facts stated as the agreed case (Record, pp. 6-14, 17-22), whereby it is claimed that the policies sued on never took effect as binding contracts. Inadvertently, doubtless, both in the petition for the writ of certiorari and in the brief for petitioner filed in this court, the learned counsel do not include the correspondence between the parties and their agents and the policies, which correspondence (Record, pp. 10-14) and policies (Record, pp. 17-22) are by part of paragraph 12 of the agreed case specifically made a part of that case (Record, p. 9).

The view taken by the respondents, and which they maintain is the correct view in the light of the entire agreed case, is:

First: That the policies of insurance were recognized and treated as valid subsisting contracts at the time of their delivery by the agent of the insurance company to the agents of the assured whose agency was limited to procuring insurance.

Second: That being valid subsisting contracts the parties are bound by their agreement as reduced to writing in the policies.

Third: That any modification of the terms of the policies, which were at the time of their delivery subsisting contracts, cannot be enforced except that modification be made in accordance with the terms of the contract.

Fourth: That the alleged modification as to cancellation is at variance with the terms of the contracts as prescribed by the insurance company, and hence to be taken in their application most strongly against it.

Fifth: That the policies not having been cancelled in accordance with their terms were of necessity in force at the time of the fire which occurred within the year for which the policies ran and the assured is entitled to recover.

Each of these propositions will be considered in turn.

First: It is respectfully submitted that the court, under the agreed case, must find a valid subsisting contract resulting from the delivery of the policies as set out therein. Each clause and paragraph is to be given its full weight and effect in connection with all the other matter therein contained.

The condition under consideration is found in paragraph 2 of the agreed case (Record, p. 7), and provides that the policies be issued, which imports a valid contract by the very terms of the word itself, on a condition which can only be interpreted to affect their custody. The condition is that these policies shall be held by the agents of the assured and not delivered to their principals until the decision of the insurance company on the acceptance of the risk and be subject to immediate cancellation by notice of a rejection of the risk, the five days' notice in the policy conditions being waived.

By the terms of this condition it then appears that the condition attached only to the holding and delivery of the policies and did not in any way affect their validity as then subsisting contracts of insurance. It is true that the condition seeks to

modify the terms of these valid subsisting contracts, contrary to the manner prescribed by the provisions of the contracts. The agreed case cannot be made to go beyond a fair and reasonable interpretation of the language used throughout the entire case. If the condition precedent affected the validity of the contracts, and was in truth that the policy should not take effect, this court could then in the agreed case possibly find that condition of affairs on which the entire argument of the petitioner's counsel is based.

In support of the contention that it was only the manual possession of the policies affected by the condition precedent of the agreed case we turn first to an examination of the policies in question (Record, pp. 12–22) which discloses a standard policy, dated the seventeenth day of April, 1895, and insuring the property therein set out for the term of one year to the seventeenth day of April, 1896. Among the clauses contained in said policies are the following (Record, p. 21): "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto," etc., and (Record, p. 22) "In witness whereof, this company has executed and attested these presents this seventeenth day of April, 1895," and "This policy shall not be valid until countersigned by the duly authorized agent of the company at Washington, D. C." It is signed by the officers of the company by printed signatures and also has the following signature (Record, p. 22), "Countersigned by Thos. F. Barrett, Agent," who is conceded to be the duly authorized agent of the insurance company at Washington, D. C., with authority to write the proposed risk.

By the agreed case the delivery of these policies took place on their date, April 17, 1895, which date is twice repeated in the body of the policies.

From paragraph 2 (Record, p. 7) it appears that Barrett issued the policies and delivered the policies on condition that

the agents of the assured should hold them and not deliver them to their principals until the decision of the insurance company on the acceptance of the risk was duly had, and the policies should be subject to immediate cancellation (the 5 days' notice in the policy conditions being waived). On April 27, 1895, ten days after the date of the policies, the special agent of the company visited Washington and refused to carry (not take) the risk and ordered the cancellation of the policies. Barrett, the local agent, sent three times for the policies and immediately made the customary entry in such cases on the register where the policies were noted "Cancelled by order of the company" (Record, p. 7).

After the fire the agents of the assured to procure insurance wrote the assured for the return of "policies ordered cancelled shortly after they were issued" (Record, p. 10). Barrett, the agent of the company, on the date of, but after, the fire wrote (Record, p. 11), "The policies are dated April 17, 1895; that within a few days after they were written we received a request from the company for their immediate cancellation and return." And the assured's agent to procure insurance again wrote on the twentieth of May (Record, pp. 11-12), "The Underwriters' policies were ordered cancelled shortly after they were issued," etc.

The petitioner, in view of this language, all contained in the agreed case, endeavors to maintain that a condition precedent attached to the issue of these policies. The respondents maintain that the policies were issued, as all the correspondence says, and that the condition connected with the non-delivery to the principals was an attempted modification which, by the terms of the policy, was a provision, agreement, or condition to be endorsed thereon or added thereto, but which could in no way affect their rights under valid subsisting contracts. If a fire had occurred between April 17, 1895, the date of the policies, and April 27, 1895, the date of the visit by the special agent, who can doubt but that these policies

must have shared in paying the losses? Their terms protect the assured from April 17, 1895, to April 17, 1896, and how could the insurance company escape payment if a fire had occurred in these ten days? By its own stipulations in the agreed case it was necessary that its special agent should order the cancellation of the risk and decline to carry (not take) the same. If the policy was in force during these ten days then it was in force in accordance with all its terms and provisions. What was there left for Barrett to do, if the special agent had elected to carry (not take) the risk? The company, both by its special and local agent, was most careful to notify the assured's agents of the cancellation of the policies. If these had no existence why give attention to such a detail, or why order their cancellation if they were mere naked papers? Can one cancel that which has no existence? Can one waive the conditions in the policies for a five days' notice when those conditions are not in force? It is clear that the authority of the assured's agents extended only to procuring insurance. When they received these policies as valid subsisting contracts, which they must have been if they insured for ten days even, their custody was that of the assured. The contention of the petitioner that manual possession is not of necessity a determining factor with reference to the question whether a contract is in force or not is undoubtedly good law. So here the manual possession by the agents of the assured of the policies in question does not alter the fact that, when these policies by their own terms and conditions and by the facts surrounding their delivery became existing contracts, the rights under those terms and conditions accrued to the assured, not to their agents to procure insurance, and to the assured alone could notice of cancellation have properly been given.

Counsel on the other side are themselves begging the question when they attempt to make a conditional modification of the terms of the contract over into a condition precedent. No one can doubt the fact that Barrett wrote and delivered poli-

cies effective on April 17, 1895. If they were not effective on that date then both he and the assured's agents were dealing fraudulently with the assured for the premium, and the term of one year both ran from that date under the terms of the policies. No other conclusion seems reasonable from the entire agreed case than that Barrett, acting entirely within the scope of his authority, wrote and delivered two existing contracts, effective at the time of their delivery, to the agents of the assured whose authority was limited to procuring insurance. Coincident with that delivery he stipulated with the agents of assured for modifications or waivers of the terms of the contracts, which modifications did not effect the attaching of the risk at the time of the delivery, but only had reference to future dealings with the valid contracts then delivered. If these contracts were not to take effect until the special agent determined whether he would take the risk (the language of the agreed case is carry the risk) what object could there have been in writing and dating these policies on the 17th of April? Why not wait until the special agent came along and determined what the action of his company should be with reference to this risk. If these were merely nude compacts in the hands of the agents of the assured to procure insurance, what occasion was there for the special agent of the company to visit those agents for the purpose of informing them that his company refused to carry the risk and of ordering the immediate cancellation of these policies.

It is further to be considered that by the agreed case (Mem. following paragraph 7 and paragraph 8, Record, p. 8) no party connected with or interested in the assured had any knowledge of these facts prior to the fire. The terms of paragraph 2 of the agreed case do not state that Barrett delivered policies which did not take effect immediately, only that the policies were to be held by the agents to procure insurance and not delivered to their principal; but these policies so to be held and not delivered, were to be subject to immediate

cancellation and a waiver of the five days' notice in the policy conditions. Counsel for petitioner advanced the proposition that manual possession of a contract does not determine its existence. This is true and in this case the possession of the policies by parties whose agency was limited to procuring the insurance does not relieve the company from its obligations under the terms of the policies to the assured named therein.

Grace *vs.* Insurance Company, 109 U. S., 278.

Second: The proposition that these policies, being contracts reduced to writing and being valid subsisting contracts, cannot be modified by parol agreements made contrary to their provisions, does not require argument as it is elemental law and supported by all the authorities cited in support of the contentions of either party to this case.

Third: By the terms of the policies (Record, p. 21, last paragraph, and p. 22) it is provided that "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have the power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." From this provision it will be seen that the proper method of modifying the contract is provided for in the contract, and that the authority of the officer, agent, or other representative of the company is limited and he can only act to bind the company within the limits of that authority.

Fourth: It appears by the agreed case that the attempted modification of the policies was by a condition not endorsed thereon or added thereto, for it is admitted in paragraph 2 that the modification, such as it was, was verbal only, although it involved a waiver of the conditions of the policies (Record, p. 7), and it is further admitted that at no time prior to the fire had the assured, by agents for any purpose or otherwise, any knowledge, verbal or written, of the proposed modification of the terms of the policies and waiver of the five days' notice clause contained therein. These policies are elaborate documents prepared with greatest care by the insurance companies and the standard policy, involved in this case, is the result of careful preparation and with due consideration given to the judicial interpretations received by the various clauses. When a party attempts to reduce to writing an oral agreement it is elemental law that the terms of that agreement are to be construed most strictly against the party preparing the paper. The instruments involved in this case are the documents of the insurance company and their terms and conditions are therefore to be applied most strictly against the insurance company. It has provided the only way in which other provisions, agreements, and conditions included in the policies may be modified.

It has written policies for the term of one year from April 17, 1895, to April 17, 1896, and now seeks to impose a condition on those policies not endorsed thereon or added thereto, to wit: the condition that they were never effective; or if effective from April 17 to April 27, not effective thereafter by reason of a waiver of the five days' cancellation clause, which was another provision, agreement, or condition not endorsed thereon or added thereto.

Fifth: From the other arguments it follows that the policies having been issued on a condition simply affecting their manual possession, and not providing they should not be valid existing contracts, became valid contracts of insurance

and operative as to all their terms and conditions including those requiring notice to the insured in case of cancellation (Record, p. 19). By the terms of the agreed case the authority of the assured's agents terminated with procuring the insurance. It is conceded (Record, p. 8, Mem.) that no notice of cancellation was given to any party connected with or interested by mortgage or otherwise in the assured until after the fire occurred, which was during the term of one year covered by the provisions of the policy. The agreed case concedes that the assured is entitled to the full amount of the policies, provided the court finds in its favor, and it is respectfully submitted that the respondents here are entitled to an affirmance of the judgment of the Court of Appeals reversing the judgment of the Supreme Court of the District of Columbia.

HENRY P. BLAIR,
Counsel for Respondents.

Supreme Court of the United States.

No. 79.—October Term, 1902.

The Hartford Fire Insurance Company, Petitioner, vs. Albert A. Wilson and John B. Larner, Trustees.	On writ of certiorari to the Court of Appeals of the District of Columbia.

[January 5, 1903.]

This case was commenced in the Supreme Court of the District of Columbia by Albert A. Wilson and John B. Larner, trustees, against the Hartford Fire Insurance Company to recover upon two policies of insurance, charged to have been executed and delivered by the company to the plaintiffs on April 17, 1895, and insuring certain property of the Ivy City Brick Company, for the benefit of the trustees, the plaintiffs. The declaration alleged the destruction by fire of the property on May 17, 1895, notice of the loss to the company, and its refusal to pay. After the pleadings had been completed the case was submitted to the court upon an agreed statement of facts. The facts agreed upon, so far as they are pertinent to the questions presented, are as follows:

"1. Prior to April 17, 1895, C. C. Duncanson, treasurer of the Ivy City Brick Company of the city of Washington, D. C., authorized the firm of Tyler & Rutherford, of said city, at their request, to place insurance for the company, loss, if any, payable to Albert A. Wilson et al., trustees under a deed of trust given by said company, as interest might appear, said Duncanson averring the amount to be placed to be the sum of ten thousand dollars ($10,000), and Tyler & Rutherford averring a much larger sum.

"On said April 17, 1895, said Tyler & Rutherford, under the aforesaid authority, proposed to one Barrett, an agent, at said city of Washington, of the Hartford Fire Insurance Company, of Hartford, Connecticut, for insurance on properties of the said Ivy City Brick Company.

"2. Said Barrett stated to said Tyler & Rutherford that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal, but that he would issue policies amounting to $2,000, equally divided on the buildings and machinery, upon the condition that the same should be held by said Tyler & Rutherford, and not delivered to their principals until the decision of the Hartford Fire Insurance Company on the acceptance of the risk was duly had, and should be subject to immediate cancellation (the 5 days' notice in the policy conditions being waived) by notice that said company rejected the risk.

"3. This condition was accepted by said Tyler & Rutherford, and the two policies of insurance in the declaration set forth were thereupon written and placed in their hands.

"4. A short time thereafter, to wit, on the 27th day of April ensuing, on the first inspection visit to Washington after the issue of said policies,

William R. Royce, the special agent of the Hartford Fire Insurance Company, known by said Tyler & Rutherford to be the representative of the company, having authority to inspect, confirm or cancel risks for and in behalf of said company, went to the office of said Tyler & Rutherford and informed them that the Hartford Fire Insurance Company refused to carry the risk and ordered the cancellation of the said policies, and on the same day the said Barrett, being on his way to the office of Tyler & Rutherford, met R. K. Tyler, a member of that firm, who had made the negotiation for the policies, had the same in his custody, and had exclusive charge of the matter, and announced to him that the company ordered their cancellation; to which the said Tyler responded, 'All right; send up and get them.'

"5. The said Barrett sent three times to the office of Tyler & Rutherford for the policies. Each time his employee was informed by one of the clerks of Tyler & Rutherford that Mr. R. K. Tyler, who had charge of the policies, was absent from the office, and they would have to see him.

"6. Said Barrett was taken sick and did not appear at his office for some days, but had immediately ordered the entry clerk to make the customary entry in such cases on the register where the policies were noted, 'Cancelled by order of the company,' which was accordingly done.

"7. On the first day of May ensuing the customary mutual accounts of business between the offices of said Barrett and said Tyler & Rutherford were settled, and the two policies were treated as dead, no charge for their premiums being presented on the one hand or asked for on the other.

"8. The existence of the two policies was never reported to the said Duncanson nor to any one connected with said Ivy City Brick Company by mortgage or otherwise, nor did he or they have any knowledge of or connection with said policies until they came into the hands of said Duncanson on May 16, 1895, and at no time prior to the fire had any party connected with or interested, by mortgage or otherwise, in the Ivy City Brick Company any knowledge of the transaction between said Barrett and said Tyler & Rutherford hereinbefore set forth.

"9. The two policies had been overlooked by Tyler & Rutherford and lay in the drawer along with a number of other policies issued by other insurance companies which had been secured by said Tyler & Rutherford for the purpose of filling the above order. Of this fact no one connected with the Ivy City Brick Company in any interest whatever was informed until after the fire.

"10. Tyler & Rutherford had found great difficulty in procuring the desired insurance, and aver that the entire amount proposed was never secured. Some of the agencies insisted on the same conditions as to cancellations as those fixed between said Barrett and said Tyler & Rutherford, and cancellations by orders of the different companies were so frequent that said Tyler & Rutherford could not at any time before May 16 know how much of binding insurance was in hand. Of all these facts the said R. K. Tyler avers that he informed the said Duncanson in the progress of the effort to secure insurance and some time prior to the fire. The said Duncanson denies that he had information as to any of these facts at any time prior to the fire, except the fact that there was difficulty in procuring the desired insurance. No specific mention, however, of the two policies of the defendant was made to said Duncanson or any one connected in any interest with the Ivy City Brick Company.

"11. On the 16th of May, 1895, a clerk of Tyler & Rutherford was directed to make up the account of the policies on hand and put them in a package for delivery. The two policies of the Hartford Fire Insurance Company, which had been overlooked and were then lying in the same drawer with the other policies, taken in fulfilment of this order, were included in the account and placed in the package with said other policies by said clerk of Tyler & Rutherford without the personal knowledge of said Tyler & Rutherford, and both were handed to said Duncanson by said R. K. Tyler, said Tyler not examining the same. Said Duncanson took the package and engaged to pay the account on the Monday week following, to wit, May 27, 1895.

"12. On the morning of May 17, after the fire, which occurred about one o'clock A. M., on that day, said R. K. Tyler came to said Duncanson and asked for the return of the two policies, stating that they had been handed him by mistake and the fact of their previous cancellation, said Tyler averring that he did not know that the property described as insured had been destroyed. Later, on that day, when the fact was known that the property described in the policies was destroyed, Tyler & Rutherford, by telephone, informed the Washington Loan and Trust Company, the beneficiary of the trust held by Wilson et al., trustees, that the Hartford policies had been delivered by mistake and requested it to send back the two policies, and were answered that they were locked up, but would be returned the next morning.

"Of this request and answer by the telephone it is agreed that the Ivy City Brick Company knew nothing at the time, and when informed of said request directed that the policies be not returned. The policies were not returned, and sundry correspondence followed between said Tyler & Rutherford, said Duncanson, and the Washington Loan and Trust Company, in the course of which said Duncanson sent a check to Tyler & Rutherford for the settlement of the account above referred to. Tyler & Rutherford refused said settlement, stating that the two policies of the Hartford were void and had been sent in by mistake, and returned the check, with a corrected account, excluding these policies. The correspondence between said Duncanson, said Tyler & Rutherford, and said Washington Loan and Trust Company and the policies sued on may be filed with this statement and considered as part of this agreed case."

The policies, which are alike, contained the following provisions:

"*Underwriters' Policy.*

No. 20229. $1,000.

By this policy of insurance the Hartford Fire Insurance Company, of the city of Hartford, in the State of Connecticut, in consideration of the stipulations herein named and of seventeen and 50–100 dollars premium, does insure Ivy City Brick Company for the term of one year from the 17th day of April, 1895, at noon, to the 17th day of April, 1896, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding one thousand dollars, to the following-described property, while located and contained as described herein, and not elsewhere, to wit: Ivy City Brick Company. $1,000. On machinery of every description, dryers, cars, apparatus, equipments and tools, contained in their one-story brick and frame structure with metal roof (about 118x165 feet) and one-story frame and brick addition with metal roof. Situate on

their tract known as 'Ivy City,' about one mile northeast of Washington, D. C. Other concurrent insurance permitted without notice until required. Loss, if any, payable as interest may appear to Albert A. Wilson and John B. Larner, trustees. (Mortgagees' clause with full contribution attached.) Attached to and made a part of policy No. 20229 of the N. Y. Underwriters' agency.

THOS. F. BARRETT, *Agent.*

* * * * * *

"This policy shall be canceled at any time at the request of the insured, or by the company, by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

* * * * * *

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have the power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

"In witness whereof, this company has executed and attested these presents this seventeenth day of April, 1895.

"This policy shall not be valid until countersigned by the duly authorized agent of the company at Washington, D. C.

GEO. L. CHASE, *President.*
P. C. ROYCE, *Secretary.*
THOS. TURNBULL,
Ass't Secretary.
CHAS. E. CHASE,
2d Ass't Secretary.

Countersigned by—
THOS. F. BARRETT, *Agent.*"

Upon these facts judgment was on December 13, 1899, entered in favor of the defendant. This judgment was taken on appeal to the Court of Appeals of the District and by that court on June 12, 1900, reversed and the case remanded with directions to enter judgment for the plaintiffs. (17 D. C. App. 14.) Thereupon the case was brought here upon certiorari. (181 U. S. 617.)

Mr. Justice BREWER delivered the opinion of the Court.

The question is whether at the time of the fire there was a valid and subsisting contract of insurance. The negotiations in respect to the policies were not between the insurer and the insured directly, but between agents

of each. As shown by paragraphs 2 and 3 of the agreed statement of facts, the agent of the insurer delivered the policies to the agent of the insured upon a condition, which was agreed to by both. That condition failed, notice of which was given by the former to the latter, accepted by the latter as putting an end to the policies, and the former notified to come and get the policies. Several times the former went to the office of the latter to receive the policies, but failed to obtain them owing to the absence of the latter from his office. Both agents treated the policies as dead, and no charge for premiums was presented on the one hand or asked for on the other. Unintentionally the policies were on the day before the fire handed in a package with other papers to the treasurer of the Ivy City Brick Company.

In view of these facts thus agreed upon the question broadly stated above narrows itself to one whether there can be a conditional delivery of a policy of insurance? If there can be, then (as there is no question of estoppel and as there was a failure of the condition) these policies had no binding force at the time of the fire. That as to contracts generally there can be a conditional delivery, and that the failure of the condition prevents the contract from taking effect is not doubted. In this court the question is at rest. (*Burke* v. *Dulaney*, 153 U. S. 228, 238.) That was an action brought on a promissory note executed and delivered by the defendant to the plaintiff, and it was held, reversing the trial court, competent to show a parol agreement between the parties made at the time of the delivery of the note that it should not become operative as a note until the maker could examine the property for which it was given and determine whether he would purchase it. Mr. Justice Harlan, delivering the opinion, reviewed several authorities and summed up by stating that "according to the evidence so offered and excluded, the writing in question never became, as between Burke and Dulaney, the absolute obligation of the former, but was delivered and accepted only as a memorandum of what Burke was to pay in the event of his electing to become interested in the property, and from the time he so elected, or could be deemed to have so elected, it was to take effect as his promissory note, payable according to its terms. His election, within a reasonable time, to take such interest, was made a condition precedent to his liability to pay the stipulated price. The minds of the parties never met upon any other basis, and a refusal to give effect to their oral agreement would make for them a contract which they did not choose to make for themselves." See also *Quebec Bank of Toronto* v. *Hellman*, (110 U. S. 178.)

If an instrument containing an absolute promise to pay may be conditionally delivered it is difficult to perceive any good reason why an instrument containing a promise to pay upon a contingency may not likewise be conditionally delivered. If the failure of the condition in the one case

prevents the instrument from becoming definitely operative, why not in the other? The rule as to conditional delivery and the effect of a failure of the condition has not been limited to promissory notes, but has often been applied to other instruments, as, for instance, a deed of land; *Leppoc et al.* v. *National Union Bank of Maryland*, 32 Md. 136; *Clark* v. *Gifford*, 10 Wend. 310; a sight draft, *Benton* v. *Martin*, 52 N. Y. 570; a guaranty, *Belleville Savings Bank* v. *Bornman*, 124 Ill. 200; *Merchants' Exchange Bank* v. *Luckow*, 37 Minn. 542.

But, coming closer to the case at bar, let us see what has been decided in respect to insurance policies. In *Brown* v. *The American Central Insurance Company*, (70 Ia. 390,) the plaintiff applied to an agent of the defendant for a policy of fire insurance. The agent doubted his authority to insure the particular property but executed a policy therefor, and, with the consent of the plaintiff, placed it, after receiving the premium, in the hands of a third party to hold until he could communicate with his principal and ascertain whether the risk would be accepted. The defendant refused to accept the risk. The property was destroyed by fire before the notice of its refusal had been received. The court held that there was no delivery of the policy save upon the condition that the insurance company accepted the risk, and that, as it did not accept it, the policy never became operative.

In *Millville Mutual Marine & Fire Insurance Company* v. *Collerd*, (38 N. J. Law, 480,) Perrin, the lessee of Collerd, the owner of a mill, applied for fire insurance, as required by his lease. Three policies, each in a different company, were sent him by the insurance agent to whom he had applied. He retained the policies, paying the premium on two, and sent word to the agent to the effect that he would look into the standing of the other company, and if satisfied about that would pay the premium on its policy. The property having been destroyed by fire before any notice or other action by him, he went to the agent and offered to pay the premium, which the latter declined to accept. In an action on the policy it was held that the company was not liable. In the course of the opinion the court said (p. 483) that Perrin "merely held the policy in his possession until he could examine it; or, to use his own expression, 'look into the standing of the company.' He distinctly refused to accept the policy and settle for it, until he was satisfied. This was, in effect, postponing the delivery, the acceptance, and the payment of the premium until a future time, and to this the company, by their agent, Buckley, assented. The condition for prepayment remained, and the company was entitled to notice of acceptance and prepayment of the premium before the contract for insurance was complete. After Perrin had rejected the policy it remained in his hands, not as an executed contract of insurance, but as a proposal to insure which he must accept by payment of the premium, before the company would be bound."

In *Harnickell* v. *New York Life Insurance Company*, (111 N. Y. 390,) the plaintiff, who was the owner of several policies of life insurance issued by different companies, was applied to by the agent of the defendant to take out policies in his company. The result of the negotiations between the plaintiff and the agent was an agreement to take out policies in the defendant company, providing he could surrender the policies he already had to the companies issuing them and obtain satisfactory surrender values thereof. In pursuance of an application duly prepared by the agent and signed by the plaintiff, the defendant company issued two policies, and sent them to its agent. The latter, under the agreement, delivered them to the plaintiff, who gave two notes and a check in payment therefor, which were returned by the agent to the company. The plaintiff, having after some effort failed to make any satisfactory arrangement with the other companies, returned the policies to the defendant and demanded a surrender of his notes and the check. The company declining to make such surrender, this action was brought, and it was held that the policies were delivered only conditionally, that the condition had failed, and that, therefore, the plaintiff could rightfully surrender the policies and obtain a return of his notes and check. The opinion of the court in that case was delivered by Judge Peckham, now a justice of this court, and in it, after referring to the agreement, it was said (p. 398):

"This, we think, was clearly a condition precedent to the full delivery and acceptance of these policies issued by the defendant, and until such condition precedent was complied with or waived, no fully executed and valid contract of insurance existed between these parties."

See also *Nutting* v. *Minnesota Fire Insurance Co.*, (98 Wis. 26.)

In the case at bar the learned justice of the Court of Appeals, who delivered the opinion of the majority, after referring to other cases of conditional delivery, (some of which we have noticed in this opinion,) stated as a reason for distinguishing this case:

"The contracts and instruments involved in those cases are very different from the policies of insurance sued upon. These are elaborate instruments and bound in stipulations and conditions. Among these, note the following, that is embraced in the general clause recited in the preliminary statement: 'This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto.'

"This and other clauses limiting the powers of agents and requiring all additional terms and conditions to be endorsed in writing upon the policies, were devised by the insurance company, itself, to prevent questions concerning the conditions upon which its policies shall be 'made and accepted' from being left to the vagueness and uncertainty of oral proof.

* * * * * *

"The condition in this case was one in addition to those contained in the policies and upon which they were 'made and accepted,' and was not in writing endorsed upon them or executed simultaneously therewith.

"Our conclusion is, that by reason of the nature and terms of the policies, it is not competent to show their delivery to the insured upon a verbal condition, making their existence as contracts depend upon the subsequent ratification of another agent."

The argument is that because the policies contained various stipulations restricting the power of the agent, it is incompetent to prove that the contract never came into operative force by a final unconditional delivery. But these stipulations apply only to a contract which has become executed and do not apply where the contract has not been completed by an absolute delivery of the instrument. No instrument could be more absolute than a promissory note, yet it is clear from the authorities that parol evidence is admissible to explain its possession by the payee, and show that that possession was not the result of a final delivery, but only of one upon condition, and also that the condition failed. Possession cannot be conclusive upon the question of delivery. Otherwise, a possession wrongfully, even feloniously, obtained would bind a party to a contract when, perchance, much remained to be done before the maker was ready to assume the obligations of the contract. There is no stipulation in this policy which either in terms or by implication forbids such a transaction as was in fact had between these two agents. There is no attempt, by parol testimony, to contradict any stipulations of the policy, something which we have recently held cannot be done. (*Northern Assurance Company* v. *Grand View Building Association*, 183 U. S. 308.) With reference to this question we quote approvingly from *Harnickell* v. *New York Life Insurance Company*, *supra*, (pp. 398, 399, 400):

"The provisions contained in the policies, which are above quoted, relate to the policies themselves after they should become executed instruments between the parties. All negotiations had before such event, and all parol agreements between the assured and the agent of the defendant, would have been merged in the contract evidenced by the policies themselves had the negotiations been carried out as intended, and such policies been absolutely delivered to and accepted by the plaintiff. Hence any oral representation or statements made by the agent of the company, and not contained in the contract of insurance, would have formed no part thereof, and could not have been insisted upon by the plaintiff as against the defendant company. . . . Insurance companies may, with entire propriety, provide in the same manner as the defendant provided in the policies in question, in cases where the contract of insurance becomes executed. There it is highly necessary and important for the company to know exactly how far they are bound and the entire nature of the contract which has been made between them and the assured. But an agreement between an individual and the agent of a company, by which the policy is accepted only upon conditions relating to the same, and an agreement to hold the policy until the performance of those conditions, or a failure to perform, cannot, as we think, result in any serious inconvenience to the company. But whether that is so or not cannot alter the right of an individual to refuse to be bound by a policy of insurance until he has absolutely received and accepted it."

For these reasons we are of opinion that the facts found show that there was no final and absolute delivery of the policies; that the condition upon which they were deposited with the agent of the insured failed, and, therefore, that at the time of the fire there was no subsisting contract of indemnity between the company and the insured.

The judgment of the Court of Appeals is reversed and the case remanded to that court with instructions to set aside its judgment and enter one affirming the judgment of the trial court.

Mr. Justice BROWN concurred in the result.

True copy.

Test:

Clerk Supreme Court, U. S.